

UNITED STATES DEPARTMENT OF LABOR

Office of Administrative Law Judges

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Date: August 6, 1999

Case No.: 1999-STA-15

In the Matter of

ROBERT E. GERMANN,

Complainant

v.

CALMAT COMPANY,

Respondent

Appearances:

Robert T. Geile, Esquire

For the Complainant

David A. Radovich, Esquire

For the Respondent

Before: ELLIN M. O'SHEA

Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under Section 405 (employee protection provision) of the Surface Transportation Assistance Act of 1982, "STAA", (codified as amended at 49 U.S.C. § 31105), and its enforcing regulations at 29 CFR 1978.100 et seq. and 29 CFR 18.1 et. seq. This provision prohibits employers from firing or otherwise retaliating against employees who have engaged in certain activities or actions ("protected activities") in furtherance of the Act's enforcement.

The Complainant, Robert E. Germann, is a former employee of CalMat who on 5/1/98 was orally advised of his suspension from his driver job by Benny White Sr., Transportation Manager, pending investigation, because he statedly threatened and harassed an unnamed fellow employee. On 5/22/98 Jeff Dyer, CalMat's Director of Labor Relations, issued a disciplinary suspension following his

investigation of allegations against Complainant by "Mr. Contreras and other employees." EX 79. It is this adverse personnel action, the 5/98 suspension without pay, which is the sole issue in this proceeding. The Complainant returned to his CalMat work following this 5/22/98 notice and 22-day work suspension.

On 11/20/98 the Administrator, OSHA, issued Findings which held that although Complainant engaged in protected activity, the evidence supports he went beyond that protection in his approach and criticism of Contreras and it was that action which caused CalMat to place him on suspension pending their investigation of Contreras' complaint. ALJ EX 1.

Then, subsequent to Complainant's return to work and based on different events which occurred months later, in late October, and not involving Contreras, CalMat terminated Germann 11/19/98.¹ This termination is the basis for a subsequent §405 retaliation discharge complaint filed by the Complainant, under investigation at the time of this STAA suspension hearing.²

Pre-Hearing Activities

Before formal hearing and following the referral of this matter to this Office for a *de novo* hearing, there were a numerous procedural filings in connection with discovery and the effect of *Malpass v. General Electric Co.*, 85-ERA-38 (Sec'y 3/1/94). The procedural history at this Office is reflected in ALJ Exhibits 1-34, so marked, identified and admitted February 22, 1999, with all these Exhibits' underlying submissions.

Hearing

A formal hearing was held February 22, 1999 through February 26, 1999 in San Diego, California. At hearing testimony was presented, cited to within by "TR: __", and documentary evidence admitted, as reflected in the transcript. This includes Complainant's Exhibits CX 1, 1A, 7, 20, 23-25, 26. Pgs.1-2; 52, 57, 67, as well as CalMat's Exhibits EX 2, 4, 9, 10-18, 20-54, 56-57, 59-65, 67, 69; referred to as CX or EX respectively. EX 8, a component of EXs 15, 17, 18 and 19, submitted to Dyer/Bruzzi 5/4/98 in White interview is also admitted, as are ALJ Exhibits 1-34 (ALJX). Post hearing brief, proposed findings/conclusions were filed by the parties.

APPLICABLE SURFACE TRANSPORTATION ASSISTANCE ACT LAW

I PRIMA FACIE CASE

To establish a prima facie case of discrimination under the STAA and shift the burden of

¹At the time of the STAA hearing he was employed elsewhere as a water truck driver. Tr. 112.

²To date, there is no indication the OSHA Administrator has issued findings on the termination complaint.

production to Respondents, the Complainant must prove three elements: (1) that he engaged in protected activity; (2) that he was subjected to adverse action; and, (3) that a causal link exists between the protected activity and the employer's adverse action. *Yellow Freight System, Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994). *See also Watson v. Smallwood Trucking Company, Inc.*, 94-STA-3 (Sec'y Oct. 6, 1994). The Complainant must also present evidence sufficient to raise an inference that the protected activity was the likely reason for the adverse action. *Greathouse v. Greyhound Lines, Inc.*, 92-STA-18 (Sec'y Dec. 15, 1992).

The causal connection component may be established by showing the employer was aware of the protected conduct and that the adverse personnel action followed closely thereafter. *Ertel v. Giroux Brothers Transportation, Inc.*, 88-STA-24 (Sec'y Feb. 16, 1989). Close proximity between the protected activity and the adverse action may raise the inference that the protected activity was the likely reason for the adverse action. *Kovas v. Morin Transport, Inc.*, 92-STA-41 (Sec'y Oct. 1, 1993)

II. PRETEXT AND DUAL MOTIVE ANALYSIS

An employer attempting to rebut a prima facie case of discrimination must produce evidence that the adverse action was taken for a legitimate, nondiscriminatory reason. The employer "need not persuade the court that it was actually motivated by the proffered reasons." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). The evidence, however, must be sufficient to raise a genuine issue of fact as to whether the employer discriminated against the employee. *Id.* at 255

The Complainant may prevail on his complaint of discriminatory suspension on a showing that the reasons for suspension proffered by the Respondent were a mere pretext for discriminatory animus. A pretext is defined as an "[o]stensible reason or motive assigned or assumed as a color or cover for the real reason or motive; false appearance, pretense." Black's Law Dictionary 1187 (6th .ed 1991). The Supreme Court has recognized the tendency of a proffered reason for adverse actions to camouflage discriminatory animus. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). The Second Circuit has held that pretext can be demonstrated by "evidence of inconsistencies or anomalies that could support an inference that *the employer did not act for its stated reason.*" *Keller*, 105 F.3d at 1523 (quoting *Sempier v. Johnson & Higgins*, 45 F.3d 724, 731 (3rd Cir. 1995) (emphasis in original)).

Where evidence of a dual motive exists, i.e., where there are legitimate reasons for a suspension/discharge in addition to the unlawful reasons, the employer bears the burden of establishing by a preponderance of the evidence that it would have taken the adverse employment action in the absence of the employee's protected activity. Cf. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989). *Clean Harbors Environmental Services, Inc., v. Herman*, 146 F.3d 12, (1st Cir. 1998). The Secretary noted that "[w]here there is direct evidence that the adverse action is motivated, at least in part, by the protected activity, the respondent may avoid liability only by establishing that it would have taken the adverse action in the absence of the protected activity." *Caimano v. Brink's*,

Incorporated, 95-STA-4, slip op. at 23-24 (Sec'y Jan. 26, 1996) (citation omitted). *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-58 (1989); Wilson v. Bolin Associates, Inc., 91-STA-4 (Sec'y Dec. 30, 1991), slip op. at 4.

FURTHER RULINGS -- Arbitration Proceeding, Decision and Collateral Estoppel

The Respondent's 2/19/99 Request for Judicial Notice, ALJX-31, with this Request's supporting Exhibits A-C, was denied 2/22/99 prior to substantive evidence presentation, TR: 34-41. Also initially presented and denied 2/22/99, was the Respondent's Motion in Limine to Determine Facts by Collateral Estoppel of Prior Arbitration Findings, Exclude Additional Evidence Thereon, and to Dismiss. Following a 11/24/98 arbitration hearing under the collective bargaining agreement between Teamsters Union Local 36 and CalMat, a three member panel conference board consisting of a union representative, a corporate Human Resources Manager and a chairman/arbitrator on 2/1/99 found, by 2-1 decision, that CalMat did not violate the collective bargaining agreement when it suspended German 5/1/98, or when it discharged him on 11/3/98.

However later in this 2/22/99-2/26/99 substantive proceeding under the STAA Act, when Respondent again moved to admit Exhibits A-C attached to its Judicial Notice Request, the parties were advised the ALJ would take this opposed request under advisement, to be ruled on in this decision. Tr. 691-99. These Judicial Notice Exhibits A-C are hereby admitted into this record.

Collateral estoppel based on this arbitration proceeding does not determine the outcome and decision here. The issues are significantly different under applicable law and the facts on the STAA suspension issue are substantively far more detailed and more fully evidenced here, with scant coverage in the arbitration proceeding where these factual issues were not adequately dealt with. However credibility weighing is affected by testimony under oath in another forum on fact events, particularly the specifics and details as to the circumstances of the encounters between Germann and Contreras over the four days, Monday 4/27/98 through Thursday 4/30/98, and between Germann, White Sr. and Contreras over these four days prior to the 5/1/98 oral suspension.

Hearsay Evidence

The regulations for STAA cases at 29 C.F.R. Part 1978, specifically adopt the rules found at 29 C.F.R. Part 18. Moreover these STAA regulations do not contain the language found in the general whistleblower regulations, applicable to the environmental whistleblower statutes, found at 29 C.F.R. Part 24, 29 C.F.R. §24.5(e), which states that "formal rules of evidence shall not apply..." To the extent the ALJ reflected otherwise on Respondent's objections, including at TR 89, 100, and misperceived the general §24.5(e) whistleblower provision rather than this STAA regulatory provision, unique to these whistleblower administrative proceedings, was applicable this was error. On analysis and evaluation of the objected-to evidence admitted, and evaluation of the record to reach findings and conclusions, the factfinder has been mindful to screen out objected to evidence admitted based on this error and of the necessity to adhere to the formal rules of evidence on hearsay evidence

presented.

Background Facts Against Which to View Witnesses' Testimony in STAA Proceeding

CalMat is a firm engaged in the mixing and transporting of cement products in cement mixer trucks over public highways. CalMat has about 55 drivers at its Mission Center Road facility in San Diego California, the site of the events giving rise to this complaint. This included, at that time, Germann, a 15 year CalMat driver with a CalMat employment association dating back to 1978, and for two years the elected shop steward. Benny White Sr. is the site Transportation Manager, employed 19 years. Barry Coley is the Vice President for this facility's operations. CalMat has other facilities in several states with several thousand employees. Jack Dyer has been with CalMat in different capacities for 18 years and is Cal Mat's Director of Labor Relations. He works out of CalMat's Los Angeles office and his superior is Mason Dickerson. Mr. Dyer responsibilities in this position are to oversee the negotiation and administration of CalMat's 25 union contracts and deal with grievances and complaints as they come up, overseeing a small section of the Human Resources Department. He was the chief CalMat spokesperson in the negotiations and execution of the San Diego collective bargaining agreement between CalMat and Teamsters Local #36 which, following a strike, concluded around early 1998. Tr.372. Germann played an active role in these negotiations. At the arbitration proceeding Dyer presented CalMat's case and questioned the witnesses but did not testify.

The prelude to the events of the four days, Monday 4/27/98 through Thursday 4/31/98, prior to Germann's Friday 5/1/98 oral suspension by White, occurred the Friday before. Friday night, 4/24/98, three CalMat employees, at Jack Gunther's request,³ hauled concrete loads in mixer trucks to a job site. As a result of Gunther's request, two of these mixer drivers, Scott and Contreras, exceeded the 15 hours on duty time applicable to intrastate commercial vehicle drivers under the California Vehicle Code and the federal regulations at 49 C.F.R. Part 395, Contreras by several hours over the 15.⁴ Scott and Contreras at the time of these Gunther requests and April 1998 events, had been employed by CalMat for about a year and a half. Contreras had about 10 years commercial driver's experience elsewhere. Tr. 247.

Testimony of Robert Germann

On Saturday April 25, 1998, Complainant went to work and was informed by another employee, Bill Wimberly, there had been an hours of service violation the day before by three truck drivers, a misdemeanor. TR: 113. Complainant stated he checked the time cards of the three

³Described as a sales agent, Tr. 10

⁴By California Highway Patrol regulation, intrastate motor carriers shall not permit or require any driver to drive more than 12 hours following 8 consecutive hours off duty, or for any period after having been on duty 15 hours following 8 consecutive hours off duty.

employees, David Scott, Tony Contreras, and Jim Truman, and verified that each had worked over 18 hours on April 24. TR: 114.

Later that day, Complainant spoke to David Scott about the hours violation, asking him why it had happened. TR: 116. Scott stated he was off-the-clock when asked by a salesman [Gunther] to work more hours. Scott responded no since he had already worked almost 15 hours. The salesman then said he couldn't get anyone to take the job but Scott replied he was almost at 15 hours and off-the-clock. Gunther then said failure to deliver his order would cost the company \$47,000 and left. Complainant testified Scott stated he then felt responsible for the loss to the company, so he punched back in and delivered the load. TR: 117. Complainant stated he talked to Scott about the importance of the 15 hour law, and that it was a crime to violate it. TR: 119

On the morning of Monday, April 27, on his way to see White, Sr., the Transportation Manager, Complainant saw Tony Contreras, one of the drivers who had violated the 15 hour rule. Complainant testified he "interviewed" Tony Contreras, telling Contreras the same thing he told Scott. Complainant commented he was disappointed in Contreras because he has over 10 years of experience and "should know better." TR: 124. According to Complainant, Contreras responded he was told "the company would be liable, fines and everything," and Germann's impression was his lecture of Contreras on the law was not sinking in. The conversation then became "heated, stern, intense," and Complainant stated he used some cuss words, which Complainant stated is not uncommon for truck drivers. TR: 124,127. Complainant testified he has heard Contreras called "Chihuahua" by another employee [Morgan] as a nickname, but Complainant testified he did not call Contreras "Chihuahua" during their exchange. TR: 128-29.

Complainant, unsuccessful in his 4/27 search for White, Sr., then saw Barry Coley and Paul Hughes in an office, and asked if he could speak with them about the over hours violation. Complainant used profanities about the situation, stating this incident was the first time in "20 years that we knowingly have a manager telling people to break the law ... on purpose." TR: 132. Complainant said Paul Hughes stated this was the first he had ever heard of a 15 hour rule, and also that Germann's profanities weren't used around there. Complainant asked for an investigation and apologized for his language. TR: 133. He said Hughes and Coley replied they would investigate, but Complainant never heard about it again. Tr. 134.

Complainant believes there was confusion within the company as to the "interpretation" of the 15 hour rule. Complainant's previous contacts with CHP led him to believe if a driver had clocked 14 hours, he could not take another load if he knew it would keep him out past the 15 hour mark. He asserts the dispatchers were telling the drivers "as long as you're out of the yard and you get stuck out at a job it's alright. As long as you feel good. You know and volunteer, it's alright to take that load." TR: 135⁵.

⁵ There was a specific hearsay objection regarding what the dispatchers were telling drivers. This is not included to prove the truth of the matter asserted, but rather to show Complainant's state of mind in reacting as he did to information about hours violations.

Next, Complainant spoke to Jim Truman, the third driver, about the over hours violation. Truman told Complainant he didn't know if his hours constituted a violation because some of his hours were spent driving a "sweeper." TR: 137. Complainant told him he didn't know either, but would look into it. TR: 138.

After Complainant went home, he called the CHP, and was referred to Larry Moss. TR: 138. Complainant told Moss he wanted to file an official complaint, but needed a day to get more information. TR: 140.

The following day, Tuesday, April 28, 1998, Complainant went to work and noticed Tony Contreras sleeping in a truck. TR: 142. Complainant testified he shook the truck with his hand on the fender to wake Contreras. When he didn't wake up, Complainant stated he got on the running board and knocked on the window. Contreras rolled down the window, Complainant told him he was still working on the overhours issue and asked him to write down his story about what had happened on the 24th, particularly Gunther's telling Contreras the company would be liable, and Complainant also told him he was going to file an official complaint with CHP and notify White of the safety violation. According to Complainant, Contreras responded by uttering obscenities. Complainant told Contreras he was also considering filing a union complaint about Contreras, as a teamster, not following the law. Complainant asserted he never physically threatened Contreras, and did not call him "Chihuahua." TR: 145.

Also on Tuesday, Complainant left a voicemail message for White Sr. since no one had contacted him. He also recontacted Larry Moss and again told him he wanted to file a complaint. When Moss asked if he wanted it to be anonymous, Complainant said "absolutely not." Complainant asked Moss to come to CalMat as soon as possible, but Moss thought it would take about a week. TR: 148. Complainant also asked Moss to do a presentation for the drivers so they would better understand the law and Complainant and Moss agreed to have the presentation meeting on Monday, May 4, at the Union Hall.

On Wednesday April 29, Complainant saw Benny White Sr., in the yard at work, and asked him if he had received Complainant's messages. TR: 148. White replied he had looked into the situation and found there had been over hours violations. Complainant told White he had filed a CHP complaint, to which White replied, "I wished you wouldn't have done that."⁶ Complainant said he told White Sr. the drivers had been "coerced, harassed or intimidated into hauling those loads." TR: 149.

On Thursday, April 30, Complainant was approached by Contreras, who complained the other drivers were "giving him a hard time" about the over hours incident and Contreras wanted

⁶ Hearsay statements by CalMat officials are admissible as a statement of a party opponent. TR: 134.

Complainant's help in setting things right with them. Since eight drivers had been asked 4/24/98 and Germann believed they made the right call that night, Complainant said he advised Contreras to apologize to the men first, he would hear of it and then he would support him. TR: 152.

Complainant testified later that week, Contreras approached him again and apologized about the over hours incident. Complainant stated Contreras told him he had originally turned the load down, but was approached again and felt pressure to take the load. TR: 155. Complainant stated they parted "on good terms." Later that same day White Sr. approached Complainant and said "Sign this and I want to ask you a few questions," referring to a form stating, "Employee placed on suspension pending investigation for ... threats and harassment of a fellow employee." Complainant asked for the name of the employee making the complaint, and White told him he would not give the name. Complainant replied if he wasn't given the name, he could not answer any questions. Complainant testified that White said, "Okay, fine. You're suspended."

While on suspension, Germann was informed by other drivers Contreras wanted to speak to him, felt bad about what had happened, wished it had never happened. A meeting was set up between them on May 11, 1998 at the union hall. The meeting lasted approximately ten minutes and resulted in the letter found at CX 7:15, EX 59. This letter is signed by Complainant, Contreras, and Clarke A. Stillwagen, Union President, and states in pertinent part, "It was determined that there was a misunderstanding and miscommunication between Reg⁷ and Tony. Any differences were resolved to the satisfaction of all. It was mutually decided that no action of any kind should be taken for or against either person."

Testimony of Antonio A. Contreras

Contreras testified he had worked about 13 or 13 ½ hours on Friday, April 24, 1998, and was finished with his loads. He was approached by a "salesman or supervisor named Jack" and asked to haul an additional load. Contreras replied that he "might" work more than 15 hours if he took the load, and requested Jack (Gunther) find another driver. TR: 248. According to Contreras Jack, after asking two or three drivers, could not find another driver so he again approached Contreras to haul the load. Contreras stated he would have to check with his supervisor, but was told by Jack, "Do your job." TR: 248. Contreras was unable to contact a supervisor because the supervisor's number he requested of the batch man was an answering machine. Then, absent a supervisor's response, Contreras asked the batch man⁸ to tell him what to do. The batch man told him he thought he should just do his job, if he felt he could do it, so he decided to haul the load. Contreras testified Jack did not harass him and did not state that the company would lose money if Contreras did not take the

⁷ Complainant's nickname is Reg or Reggie.

⁸ Apparently the batch man controls the cement flow which, according to Germann at Tr. 116, Gunther wanted poured that night to avoid having to tear up earlier poured cement if not delivered by the overhours violations. The batch man is not evidenced as a driver's supervisor. See Germann at Tr. 143-33. .

load. TR: 249.

On Monday, April 27, 1998, Contreras was approached by Germann, whom he described as “very mad...Even his face...turned red.” TR: 250. Germann told Contreras, “You son of a bitch, mother fucker, you made a big mistake, if you want to work a lot of hours you should go back to L.A. You shouldn’t be here. You have no idea why they call you Chihuahua. Because you don’t have the eggs [testicles, courage] to refuse to tell the company no, I’m tired.” TR: 250. Contreras stated he apologized and said he would not violate the 15 hour rule again, but Germann continued to swear at him. Tr. 249-250. 277-283. Contreras, a Mexican-American, born in Mexico testified he interpreted “Chihuahua” as a Mexican dog, being called “Chihuahua” an insult. TR: 253.

Probably on Tuesday, April 28th Contreras stated Germann approached him again while he was in the parking lot, and said, as testified, the same things he had said the previous day, including the obscenities but without the eggs reference of his Tr. 250 testimony. TR: 251. Contreras could not recall if Germann called him “Chihuahua” during this encounter. TR: 254. At some undated point, Contreras went to Dennis Bowman who is like a supervisor, and asked him to talk to Germann. Bowman told Contreras that Germann was “hot” but that he would come around in time. He advised Contreras to ignore Germann and just do his job. TR: 252.

Germann confronted Contreras again probably at 2-3 a.m. on Wednesday, April 29, while Contreras was in his truck. Germann came up to the truck and hit the window so hard Contreras was “surprised he didn’t break the window.” Germann then repeated some of the same statements he made on Monday and Tuesday, including calling Contreras “son of a bitch, mother fucker.” TR: 256. When Germann left he “flipped off” Contreras, a gesture he construed as “fuck you.” TR: 257.

Contreras’ testimony was that in these encounters Germann was hot and mad at least two times that he could recall and called him “Chihuahua” at these times. Germann may have used the “Chihuahau” word two or three times in all. Tr. 295-98.

Contreras who was presented during respondent’s case also testified Germann had complained to him at some point in time about Contreras wearing the company jacket, instead of the Teamsters jacket. TR: 259. Germann told Contreras “not to wear [the jacket] because he was going to tear them off.” TR: 260. Contreras’ testimony was unclear as to whether this happened during the same time frame as the incidents regarding the 15 hour rule violation and Contreras’ testimony on this subject was at times led by CalMat.

Contreras testified on Wednesday he contacted Jack Ward, the union president,⁹ leaving a message telling Ward to please stop Germann “bothering” him. TR: 258. Ward did not call him back, but when Clarke Stillwagen [Digger] did, on Friday, asking him what was going on, Contreras told him Germann had been “bothering me all these days.” While he testified he told Stillwagen what had happened, Contreras’ direct testimony did not detail what he told Stillwagen had happened.

⁹By letterhead, principal executive officer/secretary treasurer.

Contreras did testify he told Stillwagen he was “ready to quit” due to Germann’s bothering him. Stillwagen told Contreras he would talk to Germann.

Contreras also testified his family was very upset over what was happening at work. TR: 259, 262-63.

Benny White Sr. talked to Contreras at some point regarding the hours violation. Contreras told him he had not been “pushed” into hauling the last load. TR: 262. On Thursday April 30 or Friday, May 1, Contreras told White he was ready to quit due to Germann’s actions. TR: 263. At that point there was an investigation by management. TR: 264.

After Germann’s suspension, Contreras met with Germann and Clarke Stillwagen, at which time Contreras signed the letter found at CX 7, Ex 59. Contreras stated he read and signed the document “because I was helping Reggie to get his job back.” TR: 287. Contreras felt some pressure from his coworkers to help Germann, because the other men had been “flipping him off” and treating him badly since the April 24 incident. TR: 287-88.

Testimony of Benny White, Sr.

Benny White Sr.’s job duties as CalMat’s transportation manager include supervision of drivers, enforcement of company policies and procedures, and responding to safety problems and complaints. TR: 300. White testified he has an open door policy for safety complaints, and employees may file safety concerns in a suggestion box or in the form of a repair order, depending on the nature of the complaint. TR: 300. Employees are encouraged to report safety problems, and are never disciplined for reporting safety violations, White said. TR: 301.

White stated the hours violation of April 24, 1998 was brought to his attention by Germann on Monday, April 27. White checked the timecards of David Scott and Tony Contreras and verified they had worked over 15 hours. TR: 303. White stated the drivers were not disciplined “because they were asked to do that by a company representative. So, I don’t feel that the driver should be disciplined because he’s doing something that a company representative [Jack Gunther] has asked them to do.” TR: 304. On cross White testified he made Gunther’s supervisor [Hughes] aware of what he did and made sure Hughes understood it was wrong and Gunther should not have done it. White did not indicate when he contacted Gunther’s supervisor about the matter and White did not know if Gunther was ever disciplined. TR: 313-15. Germann told White later in the week the drivers had been “pushed or harassed” into working more hours. White then spoke with Scott and Contreras to “clarify” this point, and both men stated they had worked the shift voluntarily. Tr. 305. At this point, according to White, Contreras also replied, “You want to hear about being harassed,” and told White Germann had been harassing him, using racial slurs and vulgar language, and pounding on the window of his truck with his fist. TR: 304.

White advised Contreras there were company policies against this type of behavior, and asked Contreras if he would like to approach the Vice President of Human Resources [Dickerson] to

discuss “that” with him. TR: 305. White testified Germann’s activities violated Rules 15,16, and 17 of CalMat’s work rules.¹⁰

On May 1, White orally informed Germann he was being suspended, and tried to have him sign a warning notice. TR: 329. Germann was “probably” not told which employee had made a complaint against him. TR: 330.

Larry Moss of the California Highway Patrol met with White on May 6 regarding the 15 hour rule violations. TR: 304, 310. During his investigation, Moss also found a violation of the rule prohibiting drivers from working more than 80 hours in an 8 day period. TR: 317. White testified he did not tell Moss the company knew that Germann had made the complaint to CHP. TR: 320.

White testified regarding other incidents at CalMat in which confrontations had occurred between employees. He testified he knew about an argument between two employees named Lewis and Green, but he could not recall whether “cussing” was involved in the incident. TR: 324. To White’s recollection, he has never recommended suspension for the offense of cussing. White also stated he knew of no other incidents of ethnic or racial epithets being used other than the incident with Germann.

Later, in Dyer’s investigation Dyer concluded “Chihuahua” was not a nickname for Contreras. In White’s STAA testimony however it was indicated White learned, “just the other day,” from an employee, George Morgan, that he jokingly called Contreras “Chihuahua,” and Morgan stopped doing so when Contreras told him that he didn’t like it. Tr. 311-12.

Testimony of Barry Coley

Barry Coley is CalMat’s Regional Vice President for the San Diego area. Tr. 333. He has been with CalMat or its subsidiaries for 13 years, and Vice President for two years. On Monday, April 27, Germann went to Coley’s office and asked if Coley knew that there had been an hours violation of April 24. TR: 334. Coley testified he told Germann he would investigate the incident. Coley referred the issue to Benny White for investigation. TR: 335.

On Thursday, April 30, Mason Dickerson, the Vice President of Human Resources, was in Coley’s office, and Benny White knocked on the door. White said he had an employee, Contreras, who wanted to speak to Mr. Dickerson. Dickerson and Contreras spoke outside of Coley’s office, and Dickerson returned to tell Coley what had transpired. TR: 336. Dickerson told Coley Contreras had been harassed and subjected to ethnic slurs and obscene gestures by Germann, and that he was

¹⁰ “Rule 17, “Engaging in Illicit Gossip, Threats, or Derogatory Remarks Directed Toward an Employee or the Company.” Rule 16 “Violation of Any company Policy Including but not Limited to the Attendance Policy, EEO Affirmative Action Policy, etc.” and Rule 15 is “Offensive or Immoral Acts Which Adversely Effect the Interest or Reputation of the Company or Its Employees.” Tr.307, Ex 2.CalMat’s Work Rules.

ready to quit his job as a result. Coley stated that pursuant to policy, he and Dickerson decided to put Germann on suspension pending investigation of these “very serious complaints.” TR: 336.

The investigation was carried out by Jeff Dyer, Director of Labor Relations. TR: 338. Dyer sent a memo regarding his conclusions to Coley at the end of his investigation, and recommended a disciplinary suspension. TR: 339-340. Upon reading the recommendations, Coley stated he concurred and “directed Mr. Benny White to go ahead and move forward with that.” TR: 340. Coley testified it was his decision to suspend Germann without pay on or about May 22, 1998, and that decision was based solely on facts Dyer found during his investigation.¹¹ TR: 346. Coley could not recall ever having suspended another CalMat employee for cussing, obscene gestures, or for racial slurs, and he did not know if any CalMat employee had been suspended in the time he has been with the firm for cursing or making obscene gestures. Possibly Mr. Dyer would know. TR: 356-7.

Testimony of Larry Moss

Officer Moss has been employed since 1981 as a motor carrier specialist for the California Highway Patrol, charged with enforcement of CHP commercial standards, conducting site inspections of regulated vehicles and sites. TR: 52. Moss testified that Germann made a complaint in April 1998 regarding hours violations at the CalMat facility at issue. Moss recalled that “it seemed like it was just a few instances,” and he did not conduct an investigation of the CalMat facility. TR: 53. A few days later, Germann called and said, “they’re at it again,” meaning that there were continuing violations, which resulted in Moss’ determination to formally investigate. Moss testified he wrote up the complaint on April 30, dating Germann’s contact of concern to approximately a week before. TR: 56-7. [This would coincide with the 4/24/98 violation and resulting 4/27/98 internal complaints Germann made to Coley and CalMat management.]

Moss contacted CalMat on site on May 5 and 6, to speak to Benny White, Sr. TR: 54. White indicated to Moss “that he already knew who the Complainant was and that he was expecting me.” TR: 58. During the course of Moss’ investigation, he found CalMat had violated three different statutes regulating the number of hours drivers may work and drive. One the 15 hour regulation, and by a driver other than those involved in the 4/24/98 events Germann questioned. TR: 59-62.

Moss testified in his discussions with White he clearly advised him of the driver hours’ rules. White’s subsequent 7/21/98 CX23 Memorandum to All Drivers was admitted over objection. It is White’s directions to “All Drivers” on the driver hours' rules including the 15 hours’ rule and how it was to be applied by CalMat drivers, the subject of Germann's 4/98 internal and CHP complaints. White’s Memorandum advised the drivers this information was based on White’s talk with Moss of the CHP. Moss, based on his expertise, testified this Memo contained false statements as to what constituted driving time, a point Moss believed he had made clear to White in his 5/98 explanation of the rules and regulations. White had then promised Moss, verbally and in writing, he would

¹¹ Coley stated that Germann’s conduct violated provisions of CalMat’s Code of Ethics, found at CX 20. These sections were read into the record at Tr.363-366.

comply with the explained laws. Tr. 61-67, CX 24-25, CX 26:99-100 only.

Moss also testified White in their 5/6/98 talk expressed and confessed some confusion over the driver work laws. And when asked by Cal Mat whether White indicated to Moss he was trying in some way to get more hours out of the drivers than the law permitted, Moss responded White told him that due to construction there was a big push in the industry, and also they had been down due to El Nino, had lost a lot, and were trying to get as much going as they could, but they did want to comply. In CalMat's follow up question to this response, Moss testified White did not indicate he wanted to get as much out of his drivers as he could "with a wing to the law." Tr. 68-69.

Dyer's later testimony indicated that on 5/17/98 he received advice the CHP was again at the Mission Valley San Diego facility and he surmised the visit had something to do with the 4/24/98 drivers' overhours violations. This CHP visit is not otherwise explained in the record.

Testimony of Jeffery Carter Dyer

Dyer testified he first heard about Germann's alleged attacks on Contreras on May 1, 1998, from Mason Dickerson, Dyer's direct superior. TR: 379, 377. On Monday, May 4, Dyer and Donald Bruzzi, a Labor Relations Specialist, went to San Diego to investigate. TR: 380. Benny White told Dyer the details of Contreras' complaints about Germann's conduct, and gave them a list of names of individuals who might have information about the confrontations. TR: 410-16. EXs 8,12.14-15, 17-18.

The scope of Dyer's investigation was initially limited to the allegations of threatening behavior and ethnic slurs aimed at Mr. Contreras, and possible sabotage of Contreras' vehicle. Dyer testified he did not investigate the hours violation, because CalMat had already admitted the incident had occurred. TR: 670. The issue of Germann's possible involvement in a work "slowdown" evolved during Dyer's investigation.

On 5/4/98 White told Dyer he first spoke with Germann, who stated Scott and Contreras had been intimidated into working the extra hours on April 24. White told Dyer he then spoke to Scott and Contreras, who stated there had not been any intimidation. TR: 411-12. Contreras added, according to White's statement to Dyer, "if there was any intimidation it was Reg" and Contreras repeated to White the obscenities and ethnic slur which he alleged Germann said to him. TR: 412.

Dyer met with Contreras in CalMat's Mission Valley office in San Diego on May 4. TR: 444. Dyer testified Contreras related details of the first encounter on April 27, stating that Germann had used obscenities ("son of a bitch, mother fucker") and called him a Chihuahua. TR: 445. Contreras also stated there was an incident when Germann got on the running board of his truck and pounded on the window, and another incident "at the wash rack" when Germann used the same obscenities

and called him Chihuahua.¹² TR: 445. Dyer stated Contreras started to cry when he related these stories. TR: 446. Dyer testified Contreras also discussed two incidents in which his truck was tampered with, and Contreras claimed Germann said that he had opened the water valve on Contreras truck, “because you [Contreras] are a mother fucker.” TR: 446,449. Contreras told Dyer he took offense at Germann’s conduct, lost sleep, and thought about quitting his job. TR: 447.

Dyer and Bruzzi then interviewed Germann on May 4, 1998. Germann denied having called Contreras “son of a bitch,” “mother fucker,” and “Chihuahua.” TR: 477-78. Germann stated, however, that “Chihuahua” was a nickname given to Contreras by the night crew. TR: 479.

Germann told Dyer 5/4/98 that during the incident on Monday April 27, Contreras was apologetic about the hours violation. Germann told Dyer he had not been angry with Contreras but he voiced his displeasure with Contreras for breaking the law and he was surprised and angry with the company. TR: 479-81. Germann also denied tampering with Contreras’ truck and denied telling Contreras he had done so. TR: 484.

Dyer and Bruzzi interviewed Contreras again on May 5 statedly to clarify some of his May 4 responses. TR: 526. In the course of this reinterview, for the first time, Contreras advised Dyer Germann had told Contreras, when they had spoken the morning of Thursday April 30th, that he was sorry if he had hurt Contreras’ feelings.. TR: 560.

On May 11, Dyer received from Clarke Stillwagen, President of Teamsters Local 36, the letter signed by Contreras and Germann stating they had settled their differences. EX 59; TR: 648. Dyer testified this letter “concerned” him because he suspected Contreras may have felt pressured to sign the letter, although he did not contact Contreras about this, or the resolution letter, until 10 days later. TR: 649. Dyer determined CalMat had its “own moral and legal responsibility to investigate” the claim in spite of this letter, and he investigated the circumstances of the meeting which produced this letter. TR: 650.

Of all of the employees interviewed (aside from Germann and Contreras) none witnessed or overheard the confrontations between the two men. One witness, Mr. Castro, saw a parking lot incident in which Germann, loud and animated, stood on the running board of Contreras truck but Castro was unable to hear the words used. Dyer described this Castro statement as a reflection Germann was “in [Contreras’] face.” TR: 425-442;724.

Of all of the employees interviewed, Dyer testified three had information related to Germann’s alleged participation in a work “slowdown.” Dyer identified these employees as Mr. Contreras, Mr. Castro, and Mr. Bowman. TR: 605. Mr. Dyer defined a slow down as “a deliberate effort on the part of one or more employees to slow production,” and stated that in his opinion “work

¹² The attested Dyer details of these events, which Contreras told Dyer 5/4/98, reflected in Dyer’s testimony when he was requested to be specific, are not unlike Contreras’ testimony on these events at this STAA trial, commented on within and below on evaluation. Tr. 444-53.

to rules” is a euphemism for a slowdown. TR: 608. Dyer testified in fairness to Germann, Germann interpreted “work to rules” or “work rules” as meaning a strict adherence to work rules, such as the CHP 15, 12, and 80 hour rules. TR: 609. There were also reports that Germann’s statements to “slow down” had to do with speeding while in the yard and on the freeway. TR: 793. Dyer stated this information he had that Germann was trying to create a slowdown was “very credible.” TR: 641.

According to Dyer Bruzzi’s notes indicated Al Castro, a truck driver, told Dyer Germann had told Castro not to write up a vehicle repair order, even if there was something wrong with the truck. Germann allegedly told Castro to let the truck break down. TR: 786. Dyer testified on cross examination Castro, in arbitration testimony, “waffled” about some points Dyer covered in Dyer’s 5/4/98 interview. Tr.784-93.

Castro’s under-oath arbitration testimony at ALJX 31B 65:75 has been reviewed including where Castro either denied, did not recall or made inconsistent statements as to various points, particularly on the truck write-up questions Dyer, in arbitration questioning, posited Dyer had raised with Castro in the 5/4/98 interview. At one point Castro, when questioned on the truck write up area, testified he could not recall saying what Dyer, the arbitration questioner, indicated he had said to Dyer. And Castro, under oath, testified maybe Castro got Dyer’s 5/4/98 questions confused or Castro answered Dyer’s 5/4/98 question wrong. Castro, in his arbitration testimony, also advised Dyer he thought Dyer in 5/4/98 interview wanted to know about what Castro thought about racial slurs like Chihuahua and Germann; and not about truck write ups and Germann. There are no Dyer “note jottings” on the 5/4/98 Castro interview. Bruzzi’s are at Ex 23;22.

Dyer without Bruzzi also interviewed Carolyn Vallese on May 5th, at her request. TR: 630. Dyer’s direct examination indicated she stated she had some information about Mr. Contreras, but didn’t know if it was relevant to Dyer’s investigation. Dyer did not find her information of any particular use in his investigation. Dyer on cross-examination testified Vallese came forward with information Contreras had asked her to go to Mexico with him and to be his girlfriend on the side. Vallese told him “no,” and that she was married. TR: 706. Dyer’s notes, read on cross-examination, reflected the following: “Carolyn Vallese finally told Ed, who used to work at the company. Ed told Tony Contreras that he could be guilty of sexual harassment. After that, no further incidents. And this occurred about three months ago. She said she is the worst when it comes to joking around about sex, and may have encouraged Tony Contreras. ... Vallese said it is over. She settled it on her own.” Meaning that the matter with Tony Contreras being romantically interested in her had been resolved. “[She] did not want Tony Contreras to get in trouble with the company.” TR: 706-707. Dyer gave Vallese his card and told her to contact him if the behavior resumed. Dyer did not investigate the matter further, Contreras was not disciplined as a result of Vallese’s advice, and Dyer testified he did not believe Valesse’s information was at all relevant to his investigation.

Upon concluding his investigation, Dyer issued a recommendation based on his findings. TR: 682; EX 79.

Dyer testified regarding CalMat’s policies and procedures for progressive employee

discipline. He stated “the normal procedure would be to first have a written warning, and then a written warning plus a day’s suspension; then a written warning plus a five day suspension.” TR: 774; EX 2. Dyer said in his 18 years with CalMat, there have been other cases in which an employee was disciplined for swearing, but he could not recall any particular case or the context in which the swearing took place. Records on this might exist at CalMat he testified. TR: 778-79; 800-08. He also recalled a case in which an employee was disciplined for using ethnic slurs. All Dyer could recall of the incident was a driver called another employee “a black son of a bitch on one occasion” and he received a written warning. TR: 780. The only two incidents Dyer recalled where employees were immediately suspended pending investigation involved, in one case, an employee who left multiple harassing phone messages on the answering machine of employees who had crossed the picket line. The second, where a male employee told a female employee the bathroom needed cleaning and she needed to do it. It was the female vs. the male’s statements, but with corroborating witness. Tr. 837-42.

Regarding company policy on how these matters should be handled, Dyer stated Germann was not suspended to prevent a physical altercation, but rather the course of action taken was standard practice for “serious misconduct.” TR: 734.

Sequential Analysis/Evaluation from Various Testimony and Documentary Evidence Events of the Five Days from 4/27/98 to 5/1/98 White Suspension Advice

As of and prior to his work arrival 4/27/98 Germann was separately advised by two employees of the over hours violation. According to Germann he was told Jack Gunther came in looking for drivers Friday night and “got three guys to go outpretty sure they worked over the 15 hours ...(y)ou better check it out. ” TR: 113-115. Germann testified as shop steward “he’s the voice for the men, protects the menmakes sure the company follows the contract....looks out for the guys in safety situations. ..(h)e’s the mouthpiece. If they come to mehave a complaint ...or problemI carry it to management” after looking into its validity. Tr.120.

After talking first to Scott and then to Contreras about the Friday over-hours violations, Germann sought unsuccessfully to report the violations to White Sr. He then asked Coley and Paul Hughes, another management official, if he could talk to them. White Sr.’s later testimony indicated Hughes is Gunther’s superior. In this Coley-Hughes conversation Germann testified he advised them “(w)e just had an over hours violation with Jack coming in [saying] that the company would be held liablea manager telling people to break the law...” Tr. 130-134. When Coley and Hughes both said they were unaware of the incident, and Hughes during this conversation asked “what’s this over hours?” Germann testified he told them they had had violations for the last year, just not this blatant, with Gunther in this incident coming out and saying they didn’t care about fines, “(w)e’ll take all liability. Just go ahead and ship the mud [cement].” This is Germann’s attested version of this conversation where he says he stated he wanted a full report and he wanted the company’s position in writing on the 15 hour rule because they were having troubles with its interpretation.

According to Germann after first speaking to Scott and Contreras 4/27/98 about the 4/24/98

over hours violation events, he brewed on it while seeking out management officials and was not in a very pleasant mood, was upset, by the time he got to management's offices. According to Germann, he apologized for the language he used in this discussion, with many vulgar words, including "fuck and "fucking," interspersed in his statements to them on the over-hours violations. Hughes told him in that conversation they didn't use that language around there. While Germann responded in the trucking business "it's a locker room out there," and told them he was "pissed," after he got his composure he ended with an apology for his language but emphasized the violations were going to be stopped, it was a big time issue, with which they agreed. Coley said they would do an investigation, he would look into the hours violations, but according to Germann neither he nor Hughes got back to him on it. Tr. 130-133. No contrary evidence was presented that this conversation did not happen in this fashion. Germann called Moss of the CHP that day over the violations.¹³

Coley testified he was first advised of the 4/24/98 over hours violations in this 4/27/98 Germann conversation when he told Germann he would investigate and find out if in fact a violation occurred. He asked White to look into it, referred the complaint to White who was investigating it when on Thursday 4/30/98, three days later, White came to him and said one of the drivers he had spoken to would like to speak to Dickerson who was then in Coley's office.

The manner and content of White's testimony at TR. 302-332 has been considered with his written 4/30/98 notes supplied to Dyer 5/4/98, EXs 8, 17-18, and how White's testimony and demeanor overall impressed when he related what and how he sought and elicited from Scott and Contreras on his first attested undated contact with them after Germann's 4/27/98 Coley-Hughes conversation; and again on White's second 4/30/98 3:30 p.m. re contacts with them to secure further information after Germann told him the drivers felt Gunther had pushed them back out on the road Friday night to deliver Gunther's customer's loads.

From this evidence it is indicated and found the violations' investigation White earlier pursued this week at Coley's direction did not cover or elicit from these drivers the specific circumstances of Gunther's 4/24/98 request. Before his first contact with the drivers White had checked their time cards and delivery tickets. And on thereby establishing their over-hours violations, White, in his first contact, told them they were wrong and should not have done it but also told Contreras he had done a great job. See also Contreras at Tr. 260-264, 272-274.

Since White then knew the drivers had been requested to do so by a company representative, had White, in his first contact, elicited information from the drivers as to the specific circumstances of Gunther's 4/24/98 individual request of each, which was Germann's specific complaint to Coley and Hughes 4/27/98, White would not have had to again speak to the two drivers to "clarify to see if that was their feelings," i.e., were they were pushed by Gunther. Tr. 304-05. White's recording of this 4/30/98 meeting with Scott and Contreras at reflects no White elicitation of the circumstances

¹³See EX 11 Dickerson to Dyer 5/1/98 re Germann cursing in Coley meeting with no indication of violations context.

of Gunther's request, the Gunther circumstances as attested by Contreras and recorded in Bruzzi's "note jottings" on the Scott interview, but not in Dyer's Scott notes. Exs 45-46. Further, White's 4/30/98 notes reflect he sought from Scott only information about any Germann threats on Scott. White elicited no information from Scott as to Germann's "pushed" complaints, including the circumstances of Gunther's 4/24/98 requests. This was the basis of Germann's complaint to Coley and Hughes, reiterated to White by Germann, and the ostensible basis for White's recontact with Contreras and Scott. While Dyer testified White contacted Scott for this information, the CalMat records reflect he did not. EXs 8, 15, 17-19.

Essentially Germann testified when he spoke with White about the violations matter in the early a.m. Wednesday 4/29/98 he told White the drivers had been pushed to work by Gunther 4/24/98. In this conversation White told him he had looked into it, Germann was right, there were violations. According to Germann, because he thought White was nonchalant about the incidents, he told White he thought the two drivers were coerced into hauling the loads by Gunther. He then told White he had filed a CHP complaint and, according to Germann, White then told him he wished he had not done that. Tr. 141, 148-150. Tuesday night 4/28/98 Germann had advised Moss he wanted his name used on the CHP complaint over these incidents, requested Moss investigate CalMat "the sooner the better." And he also requested Moss be present at a union drivers' meeting the following Monday to explain the driver safety rules because Germann felt the drivers did not understand the rules and "when the man with the badge explains to you the law and then they're there to answer questions from the drivers, it's just better." Tr. 147-48.

CHP Officer Moss did arrive at CalMat Wednesday of the following week, 5/6/98 to conduct the 4/24/98 violations' investigation, and he made the CHP drivers' hours of work rules presentation at the Monday 5/4/98 p.m. union meeting. Tr. 150-51. By this week and dates, Germann had been suspended by White. Dyer, three days after the suspension, was at CalMat San Diego conducting his suspension investigation.

Germann's and Contreras' testimony is in agreement that over the four days, Monday 4/27/98 through Thursday 4/30/98, they had at least two encounters initiated by Germann where one-on-one, with no one else hearing or privy to these conversations, they discussed Contreras' exceeding the 15 hours 4/24/98 and, on Contreras' overall testimony, Germann's concerns as to Contreras' violating the law in these activities. The evidence indicates in these contacts Germann indicated he intended to involve or complain to the CHP, the state entity which enforces these hours' requirements, about what had occurred Friday night, as well as complain to the DMV and the union. Both witnesses are in agreement as to the purpose of these Germann-initiated contacts, albeit Contreras reluctantly. Tr. 264. From these witnesses' chronology it is clear one of these two encounters occurred on Monday shortly after Germann was told by other concerned employees of the Gunther 4/24/98 events. In this encounter respondent contends Germann directed derogatory remarks to Contreras including ethnic-slurring and the use of vulgar and obscene language, specifically the Contreras allegation Germann called him a "son of a bitch," a "motherfucker," and a "chihuahua". EX-79. Contreras placed this conversation at the cement plant where the drivers get their loads of cement, by the "color warehouse" or "color shack." Tr. 249.

Contreras testified, as recited above, as to Germann's use of this language in their first encounter Monday 4/27/98.

Contreras' direct testimony as to the circumstances of this incident would indicate Germann approached him voicing this language, telling him he should go back to L.A, his testimony indicating and inferring there were no preliminaries to these vulgarisms by Germann. On cross-examination as to the circumstances of this initial incident, while Contreras agreed Germann in fact approached him about his going over hours 4/24/98, Contreras initially testified, not too persuasively, he could not recall whether Germann in this conversation talked to him about the applicable CHP rules, or safety, and he didn't think Germann talked to him about any such rules or violations. He remembered only that Germann was "very hot ...just started telling me those bad words." But he did know and recall Germann was mad because Contreras worked more than 15 hours and "I helped--maybe I helped--cause really I helped the company" finish the big job. Tr. 264-65, 283-284.

Contreras could not recall Germann telling him words to the effect Contreras just didn't get it. This is the encounter in which Germann testified that, as with his approach to Scott on the 4/24/98 violations at Gunther's request, he told them they were teamsters who live by example and "if we don't do it there ain't nobody fucking else out there that would." Contreras' response was not as Scott's, according to Germann, and Contreras told him Gunther said the company would be liable. Their conversation became "heated, stern and intense," according to Germann, and Germann used curse words although he denied calling Contreras "chihuahua." At one point, according to Germann, he told Contreras, "you don't fucking get it man. This is a safety issue.." and told him the San Diego drivers "fucking don't break the law ...(i)f the fucking drivers up in L.A. do this they might do that up in L.A.. .. (g)o over and work over in fucking Palamar [our non-union other company] ...them mother fuckers over there they're so scared that they wouldn't report anything over there anyway..." Tr. 124-26. According to Germann the curse words he used in this conversation are not uncommon at the CalMat site, it's like a locker room and he was trying to lecture Contreras, to describe the importance of what he was saying because Contreras was nonchalant, with his response to everything "the company said that they were liable," not good enough for Germann.

Contreras was led on direct by CalMat to indicate Germann approached him when he related the circumstances of the "parking lot by the shop incident." Contreras dated this incident to Tuesday, when he stated he was walking to his truck getting ready to start it and Germann was behind him, so Contreras stopped. Contreras' direct testimony on the initiation of this event was similar to his direct on the Monday first incident: Germann approached him telling him "son of a bitch, motherfucker, you shouldn't be here, you should go back to L.A, " with no preliminaries. But he could not recall if Germann called him a chihuahua in the parking lot. However Contreras also indicated he stopped to ask Germann something and that's when Germann "started telling me those words." Tr. 251-255. Contreras did not however in his testimony further explain what it was he stopped to ask Germann. Germann in his testimony as to his encounters with Contreras over the four days prior to his suspension does not agree to any such described encounter between them. Of Contreras' Tuesday remembrance or where Germann approached Contreras.

These derogatory remarks a "son of a bitch," a "mother fucker" and "chihuahua" are the basis of "Allegation/Conclusion I" of the 5/22/98 written disciplinary suspension, which Dyer found as a fact to have been made following Dyer's investigation which post-dated the 5/1/98 oral suspension. EX 78, Tr, 682.¹⁴ This investigation occurred beginning with Dyer's Monday 5/4/98 arrival from Los Angeles at the work site. As to "Allegation II": "sabotage of Company products and equipment, potentially jeopardizing the safety of employees," specifically delineated as arising out of Contreras' allegations that Germann added water to his mixer's drum and tampered with Contreras' truck's throttle," the investigation was stated to be inconclusive. Neither Contreras nor White Sr. offered any testimony as to Allegation II or its basis. As to "Allegation III: (e)ncouraging, intimidating and harassing Mr. Contreras and other employees to engage in a work slowdown.....actions (which) occurred some months ago," CalMat found Germann did in fact engage in these acts of telling employees not to write their vehicles up for repair, not to wash them while on stand-by, telling them to "slow down" and to have "flipped-off employees for not slowing down."¹⁵ Testimony indicates the basis for "Allegation III" was developed solely as a result of Dyer's post 5/1/98 investigation: his 5/4/98 and 5/5/98 talks with Contreras, Ex 25-27, 36-37, Tr. 471, 555, 564; with driver Castro 5/4/98 who saw an undated Germann--Contreras "verbal confrontation that wasn't

¹⁴This written EX 79 suspension notice states, in relevant part, after preliminarily stating "the allegations [were] made against you by Mr. Contreras and other employees:"

I **Allegation:** *Derogatory remarks directed at Mr. Contreras, including eth[n]ic-slurring and the use of vulgar and obscene language.* Specifically, Mr. Contreras alleges that you called him a "son of a bitch," a "mother-fucker," and "chihuahua."

Conclusion: CalMat finds that you did in fact make these remarks to Mr. Contreras. Making such remarks violate[s] CalMat's Equal Employment Opportunity Policy, Code of Ethics, and Work Rules Policy.

II. **Allegation:** Sabotage of Company products and equipment, potentially jeopardizing the safety of employees. Specifically, you are alleged to have added water to Mr. Contreras's mixer's drum, causing a load of concrete to become too wet, and to have set the throttle of Mr. Contreras's truck so that its engine would race when started, which could have resulted in an accident or injury to one or more employees.

Conclusion: ...CalMat finds the evidence supporting this allegation to be inconclusive.

III. **Allegation:** *Encouraging, intimidating, and harassing Mr. Contreras and other employees to engage in a work slowdown.* Specifically, you are alleged to have told employees not to write-up their vehicles for repair, not to wash their vehicles while on standby, to "slow down," and to have "flipped off" employees for not slowing down.

Conclusion: CalMat finds that you did in fact engage in these acts. These acts constitute violations of CalMat's Work Rules Policy, Code of Ethics, and the collective bargaining agreement.

EX 79 (Italics in original).

¹⁵In testimony indicated as the sign for "fuck you."

very friendly,” statedly in the parking lot, but who could not hear what was said, EX 22-24, Tr 424-41; and Dyer’s beliefs as to what driver Bowman’s response to Dyer’s leading questions on 5/4/98 interview meant. Ex 54, 55, Tr. 632.¹⁶

The second Germann-Contreras encounter during the four days Monday through Friday prior to oral suspension where both witness are in agreement Germann approached Contreras was while Contreras was in his truck in the stand-by area, in the early 2-3 a.m. hours of their work shift, on a break, awaiting being called to load his truck. There, according to Contreras, Germann started hitting the driver's side window hard and when he rolled the window down, Germann “told me the same words...you know the son of a bitch, motherfucker, you shouldn’t be here.” By inference from Contreras’ testimony, again there were no preliminaries to these Germann statements, no purpose to his approach but to make these statements and “flip” him off while walking away. This was the incident where both agree Germann knocked or banged on Contreras truck’s window. According to Germann to get sleeping Contreras’ attention; according to Contreras’ statement, so hard he was surprised the window wasn’t broken. Germann’s testified the subject of this Germann approach and discussion was Germann’s effort to secure something in writing from Contreras as to his 4/24/98 violation of the 15 hours rule at Gunther’s request. For Germann’s use in filing a complaint with CHP, DMV and based on Contreras’ responses, with the union.

Both Contreras’ testimony and the Dyer investigation recordings of the Contreras interviews at Ex 25-26,36-37, are limited as to and scant of the circumstances, subject and words of his various encounters with Germann over these four days, even generally, other than Contreras recitation of the vulgar words of Allegation I, so as to impart the context and total thrust of their various conversations. Other than when Contreras described their initial encounter over his hours violation, at the plant or “color shack,” and when he described their last not unfriendly “pen gift” encounter, by the manner of Contreras’ direct presentation, he indicated every other intervening encounter sketchily described was initiated by Germann, who started out cursing him with the same two vulgar words, the “son of a bitch motherfucker you shouldn’t be here...” language, for no other purpose but to make these statements to Contreras, “flipping him off,” as he left him after the “window knocking--almost breaking” incident.

However it is clear, not from Contreras’ at times reluctant testimony on this point, but respondent’s post-oral suspension recordings that Contreras was told by Germann somewhere in these encounters that Germann’s concern and purpose was to file CHP, DMV and union complaints over the hours violations. And it is clear from the documentation that at some point in the second of these two agreed encounters, the early a.m. window-banging encounter of disputed intensity, Germann told Contreras his approach was to seek Contreras’ statement for this purpose. It must be

¹⁶Transcript cite may be to the beginning of Dyer’s testimony reading his, or his associate Bruzzi’s, handwritten recordings or, for reference, to the approximate point in the transcript where he testified as to what occurred with each interviewed employee for which these business records were introduced. CalMat posited these recordings reflect the methodology and thoroughness of CalMat’s investigation post 5/1/98 oral suspension.

assumed Germann's stated concerns resulted from the 4/24/98 violations. Germann had, as of this second agreed approach and encounter, complained to CalMat management, Coley and Hughes, as well as to CHP Officer Moss of the 15 hour violation in which Contreras was involved.

The testimony of Germann and Contreras differs as to the number of any additional encounters between them over the days Monday through Thursday 4/27/98-4/30/98, and who initiated these other contacts, before their last contact prior to Germann's 5/1/98 suspension. Their last contact occurred either Thursday 4/30/98, according to Contreras by EXs 36-37 (but not dated in his testimony), or on Friday, by Germann's testimony, prior to his punching in and before White Sr. advised him of his suspension. Both Contreras and Germann agree Germann, in this last encounter was not unfriendly to Contreras. Contreras told Dyer 5/5/98, but not in his 5/4/98 Dyer interview, that in this encounter, where Germann gave him a pen, Germann told Contreras "I'm sorry if I hurt your feelings but you know you made a mistake." EXs 36-37. According to Germann's testimony it was in their not unfriendly exchange in this encounter that Contreras gave him fuller and further information as to the circumstances in which he acceded to Gunther's 4/24/98 requests, e.g., Gunther came back twice and after Contreras had initially turned him down; other requested drivers would not haul the loads at Gunther's request; Contreras knew he was going to be over hours if he took Gunther's load and tried unsuccessfully 4/24/98 to get White Sr. or a supervisor because of his concerns about taking an over-hours load at Gunther's request. Tr. 154-55. Germann's testimony as to what Contreras told him as to the circumstances of how Contreras took the Gunther load and went out 4/24/98 is not unlike the 4/24/98 CalMat circumstances Contreras' testimony related in this proceeding. Tr. 154-55, 247-249. See also Contreras testimony at Tr. 289-294, including about his current confusion as to how the 12 and 15 hours laws apply to his job and how he will now seek advice as to their applicability from senior drivers who have been with the company longer than he has.

Germann testified he did not approach Contreras, Contreras approached him on the other controverted contacts between them, and there were two such contacts before their last "parted on good terms" encounter. Germann testified that due to Contreras' statements to him in the two contacts it is agreed Germann initiated over the 4/24/98 hours violations, and Contreras' response to his efforts to prevent 15 hour violations and to get Contreras' statement for use in pursuit of his violations' complaint, he did not thereafter approach Contreras Tr. 143. According to Germann in the "knock on truck window" incident, Contreras used the "fuck" language to respond to Germann's requests including "(a)w, fuck these guys," which Germann took to mean the drivers Germann represented. And Contreras indicated he did not want to cooperate in Germann's efforts to document the circumstances of the violations. Germann stated he then told Contreras he was considering bringing him before the union because he was not following the law. Tr. 141-143.

According to Germann, Contreras approached him on Thursday while out on a job site. Germann was getting ready to leave and Contreras had unloaded behind him. Contreras asked his help, as his union steward, because Contreras said the men were giving him a hard time and Germann had to tell them, for Contreras, he was sorry and wouldn't do it again. According to Germann, in response to Contreras seeking him out in his fashion in this encounter, he told Contreras, in his

opinion, the way for Contreras to approach the situation was to apologize to the men who were with him 4/24/98. He told Contreras a total of eight had been asked [4/24/98], they made the right call, and Contreras broke the law. If Contreras apologized to the men first, Germann told him he'd hear back about it and then he would support Contreras.

Contreras on direct was led to testify as to an incident at the "wash rack." Tr. 255-258. But he did not testify as to the circumstances of this incident. This occurred, he believed, on Wednesday the same day he unsuccessfully tried to call the union president, speaking first to employee driver Ellwood. Thursday was the day Germann testified Contreras came to him telling him his fellow drivers were blaming Contreras for his actions in acceding to Gunther's requests. Then Contreras could not in testimony recall the time, or what happened at the "Frick job site." This was another vulgar and obscene language incident of Mr. Dyer's testimony although none of the sites or circumstances of the various incidents which formed the basis of the suspension notice were specifically delineated in the suspension notice. Further, only the circumstances of the two agreed encounters: the first on 4/27/98, and the early a.m. standby "window pounding" encounter were set out in Contreras' testimony. Contreras' testimony detailed little as to the circumstances of the other encounters he stated took place, with a lack of clarity or full clarity as to site. Contreras was led to testify there was an incident at the Frick job sit. But, "I don't recall that time but he might--he might [have] told me those words but I mean it happened there once too but he might tell me the same words." Tr. 259-260. Contreras' direct testimony as to what occurred between himself and Germann in these four attested incidents the week of 4/27/98 prior to their "pen gift" encounter which both agreed was not hostile, not unfriendly, an encounter just before White suspended Germann 5/1/98, would indicate Germann approached him in each with his "mf-sob" words and for no other purpose but to voice these words to him, as in the sketchily described "wash rack" and "Frick job site" incidents. Contreras' arbitration testimony on the pre-5/1/98 events is as unspecific as to surrounding circumstances and details.

According to Contreras' testimony he had apologized to Germann, and he was so affected by Germann's complaints he had worked over 15 hours that his wife and children were affected. They were crying and sad, he was ready to quit and "(t)hat's when I went to talk to Benny White. However, notwithstanding Contreras' direct testimony at Tr. 258-264 which would indicate he initiated the contact with White Sr., which EX 8 indicates occurred Thursday afternoon 4/30/98 prior to White's recontact of Scott over the 4/24/98 overhours violation, the fact is established by this document and White's testimony that White initiated this contact, not Contreras. And it was initiated because of Germann's continuing complaints to CalMat as to the circumstances of the 4/24/98 violations and CalMat's management's response to it. White Sr. recorded 4/30/98:

Regi had told me that Tony had felt he was pushed into wor[k] late Friday
April 24, 1998 night

April 30, 1998 3:30 p.m.

Talked to Tony and he told me no that he was not tired and felt safe to help
the company and that is why he did it.

He then told me he was thinking about quitting[.] I ask why he told me Monday morning April 27, 1998 Regi called him a racial name chihuahua and mother fucker son of a bitch and told him he should quit move back to L.A. or work for one of the other companies. Tony also believes Regi pushed his throttle wide open so the engine rive up when started and put water in the drum also[. T]hen on the morning of April 28, 1998 Regi got on the step of Tony's truck and beat on the window so hard Tony thought it was going to break calling him a mother fucker and son of a bitch you know you did wrong and I am going to called the union on you and the CHP.

I ask if he would like to talk to our VP that he did not have to take this and I was sorry it happened. We both went upstairs and Tony told Mason Dickerson his statement.

Mason they told me suspend Regi untill we can investigate[.]

April 30, 1998 4:55 p.m. David Scott did not rec any threats from Regi.

Contreras' testimony as to this talk with White Sr. was that when he said he was ready to quit, White first told him he didn't have to quit, White would go ahead and talk to Germann. They then went to White's office and Contreras went "upstairs" to talk to someone else, whose name he did not recall, where he told "them" what happened, about his problems with Germann, that Germann was "bothering" him. Contreras' testimony relates no information as to how his conversation with White went from White telling him he would talk to Germann, to Contreras going to "upstairs" management. As elicited, it related nothing from which it can be found or inferred he was asked by White if he wished to go to upper CalMat management. White's testimony at Tr 305-306, 309-310 makes no mention of any initial advice to Contreras he would talk to Germann about what White has characterized as Contreras' "let me tell you about harassment" response to Germann's complaint Gunther pushed the drivers into the over hours violations. This pushing complaint was the subject of White's second investigative contact 4/30/98, his 4/30/98 recording and the precipitating event for White's talks with Contreras and White bringing Contreras to talks with "upstairs" management, Coley and Dickerson. Then, White's manner on the stand, and his in-person impression of measured careful response at Tr. 305-06 as to how and why he put the suggestion to Contreras of going to higher level CalMat management, was noted. To be further evaluated against the record in its entirety on sorting out the sequence, context and content of the events as related by the various witnesses.¹⁷

Contreras testified he then spoke with someone else, assumably Dyer, in connection with an

¹⁷White's limited-in-detail STAA testimony on the events which impacted the deciding suspension issues here has been considered and weighed in fact finding and credibility. Along with his arbitration testimony which reflected scant details on the facts and circumstances of the Contreras-Germann encounters, and how on 4/30/98 he took Contreras to talk to Dickerson. ALJ 31B 15-30 of arbitration proceeding.

investigation, where he told him the happenings as he related in his STAA testimony. Contreras' testimony does not relate what specifically he was asked by the "upstairs" CalMat manager, or what he told this manager. His led direct testimony also does not reflect what he told White about the specifics of the various Germann encounters over the four days including Thursday 4/28/98. But Contreras testified White told him he did a great job 4/24/98; he told White that Gunther and nobody pushed him to do the overhours job, he did it because he knew the job wasn't complete and he knew he was okay to drive. At the arbitration proceeding White testified Contreras told White he would work overhours again, if the customer needed his help. ALJX 31B 5:17

Regional Vice President Coley testified he assigned the investigation of Germann's overhours complaint to White. White was investigating Germann's complaint when White told him and Dickerson, who was in Coley's office, that one of the drivers he had spoken to in connection with this ordered investigation wanted to speak with Dickerson. Contreras and Dickerson talked outside Coley's office. On Dickerson's return, Dickerson informed Coley Contreras told him "he had been harassed, ...there were some racial slurs, obscene gestures. I believe that at that point that Mr. Dickerson implied that Mr. Contreras was even ready to quit. He felt very uncomfortable." Tr. 336. There is no indication from the wording of Coley's testimony that Coley ever talked to Contreras but he testified he and Dickerson then discussed the situation and Coley decided to place Germann on suspension until they had a chance to investigate Contreras' very serious complaints under CalMat's work ethics rules and EEO policy.

Coley testified he played no role in the investigation which he directed Dyer to conduct, and he testified he does not get involved in investigations or day-to-day operations. When Coley received Dyer's 5/22/98 conclusions and recommendations, EX 79, he spoke to Dyer about them and decided a disciplinary suspension without pay should be effectuated. Coley testified his knowledge of the facts as to the Germann-Contreras confrontations is contained solely within EX 79. He also testified he did not know who Dyer interviewed or what they said. However he did indicate he knew Contreras accused Germann of having cursed, used obscene gestures and a racial slur "over and over again for four days." Tr.368-69.

However Dyer's testimony and recordings reflect Coley was not as personally removed as is represented, particularly on the day of the 5/4/98 driver interviews, from Dyer's investigation activities prior to Dyer's 5/22/98 report and their discussion. Coley also testified Germann's CHP overhours violation complaint played no part in his 5/22/98 decision which was based on the facts found in Dyer's investigation.

White Sr., assumably early on 5/1/98, effectuated Coley's and Dickerson's 4/30/98 decision and orally suspended Germann, advising Dyer. White offered no testimony in contradiction of Germann's testimony as to how White handled this notice of suspension for threats and harassment of a fellow employee, that White would not tell Germann who the involved employee was or what the threats and harassment he was accused of were. Tr. 155-156. While White's testimony was silent as to his involvement in the following week's investigative activities by Dyer, Dyer's testimony and the Dyer/Bruzzi notes indicate White was a participant, advising which employees should be

interviewed, making contacts with employees who might supply information about what happened.

Since it is nowhere indicated in testimony or recordings what, if any, specifics and particulars as to the generalized 4/27/98 and 4/28/98 incidents White elicited from Contreras in his 4/30/98 3:30 p.m talk, or Dickerson/Coley elicited, there is a void in the evidence as to how White determined who he would talk to before Dyer's 5/4/98 arrival. Or how he approached them, what he said to them, the basis on which he advised they would be interviewed. Short of his comparison of time cards and job trip tickets to see who worked when Contreras and Germann worked during the four days until 5/1/98, the record is otherwise silent. Tr. 413-15. Exs 19. 14-15. None of the selected interviewed employees, aside from Castro, were percipient witnesses to any of the controverted encounters between Germann and Contreras and the statements of most reflect what was said to them by others, imprecisely dated, including by Germann and Contreras. From EX 15, White had 5/1/98 conversations with some of the drivers the total contents of which is unknown. It can be inferred Germann's suspension three days before and Contreras' involvement in it were, by 5/4/98 and as a result, significantly discussed by employees at the job site, a topic of conversation at the Monday 5/1/98 union meeting previously scheduled to inform as to the STAA hours rules.

On 5/1/98 Dyer spoke in person with Dickerson who told him Contreras complained personally to Dickerson that Germann called him a "son of a bitch, motherfucker, chihuahauin a pattern of harassment over a period of about a week." Tr. 379. These second-hand statements related to Dyer by one of the management officials responsible for the decision to then immediately suspend Germann on Contreras' accusations, in testimony in this proceeding and in Dyer's recordings, do not indicate or contain anymore specifics or details offered by or elicited from Contreras by management 4/30/98 as to the circumstances or context in which these Contreras allegations occurred over the four days and early a.m. 5/1/98 prior to suspension. They are as generalized as White's 4/30/98 recordings on the specifics of the circumstances in which these words allegedly were used, including approximate place and time, on which an investigation could be based. Dickerson indicated only that the events occurred on Monday and Tuesday. White, in accord as to days and dates, indicated two incidents on 4/27/98 and 4/28/98. They are as generalized as White's 5/4/98 statements to Dyer on these occurrences, at EX 17-18. Dickerson on 5/1/98 in the conversation where he discussed with Dyer the charges he wished Dyer to investigate, also related Contreras told him Germann tampered with his truck's water valve and throttle and Germann admitted to Contreras he did both. Other than the Monday and Tuesday notations in Dyer's notes as to the Dickerson conversation there are, as to these events, no further details or specifics reflected as conveyed by Contreras and recited to Dyer by Dickerson. EX11.

Events of Second Week, 5/4/98 -5/11/98: Events Following Suspension

Based on the discussions Dyer and Bruzzi had with White on 5/1/98 by telephone and on site in person 5/4/98 as to which employees to question on Contreras' charges, and Dickerson's directions as to what was to be investigated, on 5/4/98 and 5/5/98 employees were called to interviews with

Dyer, Bruzzi present, in an office near to Coley's.¹⁸

Conduct of Interviews -- Methods Used -- 5/4/98 INTERVIEWS and EVENTS

Dyer's testimony as to what was said and told to him in his various employee interviews was based on his recollection, and his and Bruzzi's notes. In evaluating the various witnesses' STAA testimony and Dyer's attested recollections, the Dyer-Bruzzi raw note jottings have been reviewed against Dyer's reading of these notes, his handwriting and abbreviations not always clear; against Dyer's testimony as to what these jotted notes meant as recollected months later, given the manner in which Dyer and Bruzzi elected to memorialize the contents of the interviews; and reviewed against the factfinder's review of what these note jottings and statements actually reflect or infer, or do not infer or do not necessarily infer, in the context and content of the interview circumstances and the manner of questioning portrayed. What struck at times in Dyer's testimony was that what was recorded in these notes was not always reflective of the import of the witnesses testimony, e.g., as when on review of the earliest interviews, while in EX 16 Dyer represents Coley on 5/4/98 stated to Dyer he heard Contreras on 4/30/98 tell Dickerson the Germann events and words, Coley's testimony does not indicate this. Rather it would indicate Coley did not hear what Contreras said when taken out of the room by Dickerson. Coley relied on what Dickerson told him Contreras said and the entire contents of Coley's testimony does not indicate Coley talked to Contreras when White brought him to upper management's office the afternoon of 4/30/98. Tr. 400-407, EX16. See Tr. 405-06:15-20.

Since CalMat, beginning with White's 4/30/98 recording was documenting, but in generalized and non-specific fashion as to the specifics of Contreras' allegations, and since Coley heard only what Dickerson told him, also generalized, the manner of recording takes on some significance in evaluating the factual basis for representations the expletives and "chihuahua" of Contreras' allegations were repeatedly voiced by Germann. Particularly since the only participants in these stated encounters gave conflicting testimony as to the voicing of these words, and how they were voiced; and gave conflicting, confusing and imprecise testimony as to when, where and how any encounters occurred, and Contreras' STAA testimony is, as to other than the two agreed encounters and the last "pen gift" encounter, so generalized. Contreras' and White's arbitration testimony as to these events is similarly so generalized. These observations all go into the evaluation of Contreras' reliableness where the repeatedness of the alleged words is a factor in employer's argument as to why, in the circumstances, both the oral and written suspension actions were taken.

¹⁸Bruzzi was a labor relations specialist working for Dyer who sat in on most of the interviews with no indication Bruzzi asked any questions. Bruzzi did not testify. Bruzzi's notes on these interviews are evidenced, as are the notes Dyer separately recorded on most of the interviews, but not on the 5/4/98 Contreras and Castro interviews, 5/5/98 Bowman interview. None of the Dyer-Bruzzi notes were evidenced or discussed at the arbitration proceeding. EXs 22-26. Dyer termed these notes "note jottings."

5/4/98 Interviews and Events

On 5/4/98, after speaking to Coley and White Dyer, interviewed the following employees in the following order: Blackman, Tr. 417, Exs 20-21; Castro Tr. 425, Exs 22-23; Contreras, Tr. 471, Exs 25-26, with Contreras' unsolicited telephone call back to Dyer to advise of information he had omitted from the interview, Ex. 27. Then Bob Smith, TR. 171, Exs 28-29; followed by Germann at Tr. 471, Exs 30-31, an interview attended by Stillwagen the Local 36 President, who had been advised by Dyer when he telephoned 5/1/98 on Germann's suspension only that CalMat was investigating several types of misconduct, all serious.

Dyer at one point testified Blackman's statements provided a basis for his "slowdown," truck washing charges of Allegation III, 5/22/98 written suspension notice. Along with Contreras' allegations and Bowman's EX 54 statements the next day, these constituted the basis for CalMat's charges Germann encouraged, intimidated and harassed a work slowdown. Cross-examination of Dyer's basis for recollecting such statements by Blackman, Bowman and Castro, based on what the jotted notes reflect, and for reaching such conclusions based on what the jotted notes reflect is at Tr. 785-90, 842-853.

The Bruzzi note jottings do not reflect Castro identified Germann, in response to some nebulous, ambiguous and suggestive remark or question by the interviewer, as the individual who didn't want the employees to do a good job, a phrase itself poorly defined as to meaning or as a question. If that was the question asked, which is also not indicated by the "note jottings." Bruzzi's jottings do not reflect Castro said Germann was one of the people in the yard who had a problem with Contreras putting in a lot of hours, when Castro stated "everyone knows " about the hours Contreras worked or wanted to work. The "note jottings" also reflect Castro told Dyer Germann said "basically you can't talk to me like that," in response to whatever Contreras said to Germann. Tr. 433-435.

Dyer advised Germann at the end of the 5/4/98 interview he continued on suspension pending further investigation. Dyer testified in interview he found Contreras a very credible person and he adjudged him very affected by what he related, Dyer remembering Contreras was close to tears, with tears in his eyes when he told him about the affect on his family. Dyer testified he adjudged Germann evasive in his interview. EX30.

Dyer and Bruzzi then had discussions with Coley, and White spoke with them by telephone to Coley's office. According to Dyer's note jottings, in this conversation Coley told them they would probably get little to no information regarding the slowdown now as the union knows employees raised the issue. Coley's testimony did not reflect this conversation or that a slowdown was a component of his directions as to Dyer's investigation. It must be assumed the basis of this Coley slowdown topic and slowdown focus arose solely from what Contreras stated 5/4/98 and what was stated or elicited in the employee interviews that afternoon. (Blackman, Castro, Smith.) In testimony

as to his post 5/4/98 contacts, Dyer related he first advised the union president of slowdown allegations on 5/6/98, and these were based on what he viewed as the highly credible statements of Contreras and Castro. Coley suggested Dyer interview Al Clark, Bill Brothers and Paul Ellwood for any knowledge of the issues, Coley stating he regarded them as trustworthy employees who would tell the truth whatever it was.

The night of 5/4/98 the union meeting took place at which Germann testified he had arranged for a presentation on the CHP trucker work hour rules, including those violated 4/24/98 by Contreras and Scott.

5/5/98 INTERVIEWS and EVENTS

The next day, 5/5/98, Dyer first reinterviewed Contreras, he testified to clarify some issues and to get responses to issues that came up in the prior day's investigation. EXs 36-37, Tr. 526,555,564. Then drivers Brothers, EXs 38-39, TR 563-69; Bowman, Exs 53-54, Tr. 632-39; Ellwood, Exs 40-41, Tr. 570; Edwards, Ex 42, Tr. 587 and Scott, Exs 44-45, Tr.608 were called for interviews. Blackman was reinterviewed because he was a member of the night crew and, according to Dyer, Germann told them 5/4/98 "the whole night crew referred to Mr. Contreras as chihuahua." Germann in testimony denied he said the whole night crew; rather he indicated Contreras had been referred to as chihuahua on the job and explained why, as he did at EX 30. See also Bruzzi at EX 31. Since it appears the Dyer methodology 5/4/98 was not to first interview both principals to secure their varying and specific statements on events and facts before determining what facts known to others were pertinent to their investigation, this Blackman recontact took place.

Dyer originally indicated Contreras told him Contreras had talked to Bowman about all Germann had done to him, all the incidents. But Dyer recorded no note jottings on his Bowman interview. Dyer had little recollection as to what statements Bowman advised 5/5/98 Contreras related, other than that they were about some Germann "abuse." However what the Bruzzi notes reflect Bowman said when questioned, and what questions were asked of Bowman, give more balance to the picture Contreras gave to Bowman as to what had actually happened between Contreras and Germann than Dyer's hazy and generalized recollections reflect; and further insight as to how the charges of 5/22/98 Allegation III evolved and its factual foundation.

While Contreras' undated Ex 54 contact with Bowman does reflect Contreras told Bowman Germann "cussed at me and that pissed me off, " followed by Contreras' remark some other driver had said he was a company man, Ex 54 also reflects Dyer asked Bowman "what changed?, (w)e had been doing this before Reg ever said he's [Contreras'] done it! " Bowman apparently replied to this Dyer question by saying that Contreras may be sympathetic to the company. And elsewhere Bowman indicated Contreras was a new man who wanted to do good for the company. Dyer was advised by Bowman Scott had apologized, but Contreras got abrasive back, and Bowman is noted at another point as saying he was surprised that he [Contreras] blew up at Reggie.

These Bruzzi Bowman notes at points appear to the factfinder in character and

methodology unlike some of the other Dyer-Bruzzi notes which generally appear to be more in the nature of raw "note jottings," which at times resulted in ambiguous and cryptic information, not necessarily dated as to events. Absent a fuller write-up from such raw notes, or the interviewee's signed statement, the context, content and meaning of what the interviewee intended in response to what and how it was asked, is not always clear and many times not necessarily in accord with Dyer's testified recollection and/or interpretations. Bruzzi's notes did attempt at points to reflect questions asked and answered. They indicated Dyer asked leading questions as to whether Germann told employees not to clean their trucks and "work as hard as they should," to which Bowman in response gave ambiguous replies. Then when Dyer's testimony on these notes, used to refresh his own memories as to the Bowman interview are viewed against the notes themselves, it would appear Dyer's testimonial reference to the undated "Tony said Reg got in his face and Tony was defending himself" does not give the full picture of what Bowman reported to Dyer on the 4/27/98-4/30/98 Germann-Contreras events. Since this indented quote cited to by Dyer in testimony follows under Bruzzi's "weekend" conversation reference, and since Contreras testified he talked to Bowman after one of his Germann encounters, the entire presentation indicates a date-unspecific hodge-podge of interview questions on the 4/27/98 to 5/1/98 Germann-Contreras encounters/statements Dyer was to seek under his initial 5/4/98 EX 16-17 directions from Coley. Tr. 631-39.

Then 5/5/98 interviews of La Belle Exs 48-49; followed by Corriea Exs 50-51, Tr. 629 took place. Dyer testified La Belle was interviewed because he was a member of the night crew but the Dyer-Bruzzi note jottings indicated he was also questioned as to any pressure not to clean his truck or keep it clean. According to Dyer, Corriea was contacted because Contreras told White he had told Corriea of his contact with Germann during the week of the events. Tr. 628-30. Since White's testimony and the records on White's statements as to specifically what Contreras told him pre-suspension are so limited, statements such as these add strength to the impression White, in the 4/30/98 discussion with Contreras, in unknown fashion covered more than his testimony or recording reflects; and/or that White, subsequent to oral suspension 5/1/98-5/5/98 and in connection with his reflected conversations with higher CalMat management, elicited further information from Contreras and/or other drivers, which White did not reveal in testimony, which played a part in Dyer's investigative actions.

Corriea told Dyer he spoke to both Contreras and Germann, and neither said either was angry at the other or used cuss words. Bruzzi's notes on the Corriea interview, but apparently not Dyer's, reflect the conversation between Germann and Contreras was over the 15 hours violation. Corriea, in Bruzzi's notes, is reflected as stating "I think it's got blown out of proportion." Dyer's testimony's interpolated "incident" into his recollection from this Bruzzi jotting, with Dyer testifying Corriea said he thought the overhours violation incident developing into a grievance and suspension with all attendant activities was blown out of proportion. However given how Bruzzi recorded his jottings, here and elsewhere, just what the "blown out of proportion" language in the Corriea statement meant, including as to the overhours violation, and what Corriea stated he told Contreras, noted in Bruzzi's notes but not Dyer's, leaves an impression of ambiguousness and lack of clarity. While the Dyer-Bruzzi note jottings on the Corriea interview are short compared to the other interviews, and contain limited topic items, they demonstrate the problems the Dyer-Bruzzi manner

of memorializations create in evaluating just what the employee said, to just what was asked, in what manner of questioning. Elsewhere in the record it is indicated that Corriea, like Castro, and Contreras, is Mexican-American.

Following their last arranged employee interviews 5/5/98, Dyer in White's presence spoke with Ms. Vallese, a woman cement mix driver, at her request. Dyer's direct testimony on this interview was he really didn't find anything she had to say relevant to his investigation. According to Dyer's testimony, she told him at a union meeting the night before the altercation between Germann and Contreras was discussed and some employees were advocating the employees should tell the truth in the company's investigation and others were saying to keep your mouth shut. So she came forward. Dyer's direct testimony enlightened no further as to the substance of what Vallese told him 5/5/98. So why he determined what she told him 5/5/98 was not relevant to his investigation could not, at that point in his presentation be determined. Tr. 630-31, EX 52. Dyer's testimony on cross-examination, recited within, reflected his reading of his handwritten notes on the Vallese interview. Vallese later testified as claimant's rebuttal witness and CalMat's post hearing brief questions whether she was a "plant."

5/5/98 and 5/6/98 CHP SITE VISITS

On 5/5/98 and 5/6/98 CHP Officer Moss was in contact with and at CalMat as a result of Germann's pursuit of his 4/27/98 internal CalMat complaint to government officials.

Dyer maintained the overhours violations and the CHP visits were not relevant to his investigation because he wasn't investigating the overhours violations, that was left to White and White had already determined a violations occurred before Dyer arrived 5/4/98. The record indicates Dyer's investigation of Germann arose out of Germann's complaint of overhours violations and White's investigation. As evaluated below, Dyer's investigation was inextricably intertwined with the overhours events Germann complained of and would not have occurred but for Germann's pursuit of an investigation of the causes of the overhours events not just the fact of the overhours violations, and the resulting 4/30/98 White-Contreras interview.

Dyer's Further Actions After 5/4/98- 5/6/98 Interviews

Dyer telephoned Stillwagen the president of Local 36 on 5/6/89 to keep him posted on the status of his investigation. He left a message employees had said Germann told them not to do work and to slow down. Dyer testified these employees were Contreras and Castro, although he did not indicate he gave Stillwagen these employees' names. According to Dyer's testimony, he had very credible information from these two employees that Germann was trying to get people to slow down and reduce productivity. Dyer's notes also reflect his telephone message to Stillwagen advised the specific incidents stopped after the first day, and it was hard to get specific information. Dyer's testimony on the stand this recorded statement meant anything other than what it said as to the dates of any of the events he was investigating, including the Contreras-Germann encounters, did not strike as plausible. Dyer's telephone message also told Stillwagen there was no indication, at that time, that

Local 36 was involved, and nothing to indicate Germann's actions were anything but his own doing.

When Stillwagen called him back on receipt of this telephone message and, at Dyer's invitation, told Dyer he didn't know of any other employees he should talk to, or of any incidents, Dyer then advised Stillwagen employees would talk more truthfully in a deposition, Dyer suggesting that maybe what Dyer was doing wasn't the right forum. Dyer then indicated to Stillwagen CalMat was contemplating filing a lawsuit against Local 36 for Germann's actions. EX 56. Tr. 640-644.

On 5/7/98 Dyer, for the first time, tried unsuccessfully to contact Fedoc, the batch plant operator and a member of a different local, to find out if Contreras, pre 5/1/98 and during the first week's events at issue, had a wet load of cement which needed adjustment, information bearing on Contreras' sabotage of equipment/materials accusation.

THIRD WEEK'S EVENTS-- 5/11/98--5/15/98

CALMAT'S RESPONSE TO ADVICE FROM CONTRERAS AND GERMANN THEY HAD RESOLVED THE MATTER

When Dyer finally contacted Fedoc the next week, the night of Monday 5/11/98, Fedoc had no recollection of any dried up load two weeks before. EX 57, Tr. 644-47.

The next day and by May 12, 1998 Dyer received the letter signed by Stillwagen, Germann and Contreras which indicated there had been a 5/11/98 meeting at the union office between Contreras and Germann where it was determined there was a misunderstanding and miscommunication between them, any differences were resolved to the satisfaction of all, and it was mutually decided no action of any kind should be taken for or against either one and toward that end they requested Germann be returned to work with no disciplinary action taken. EXs 58-60. Stillwagen called Dyer the morning of 5/12/98 about this 5/11/98 letter of resolution.

Dyer told Stillwagen he had been going to call Stillwagen that day to let him know CalMat would try to wrap up their investigation but Dyer didn't know how the letter of resolution would affect this. CalMat had its own obligation to investigate, he advised. According to Dyer's notes Stillwagen in this telephone call said Contreras "isn't saying it didn't happen. Reggie's admitted to everything that Tony said. It was Reggie's idea to pressure solidarity against the company." EX61. The "it" and "that" of EX 61 are not set forth in it, and while Dyer testified as to what his understanding of this Stillwagen conversation was, he did not specify what "allegations" he or Stillwagen may have been referring to.

Dyer testified he told Stillwagen he was going to respond to the 5/11/98 resolution letter by requesting information as to the 5/11/98 Germann-Contreras meeting at the union office. Dyer later testified he did not contact Contreras at that time to find out from him the circumstances of, and what happened at the 5/11/98 meeting resulting in the resolution letter. Dyer had no contact with Contreras until after the 5/22/98 decision was made to impose a disciplinary suspension on Germann,

to then find out if Contreras would be willing and able to work with Germann. Contreras' testimony establishes he entered the 5/11/98 resolution agreement voluntarily.

Dyer, that afternoon 5/12/98, responded in writing to this notification of resolution between Germann and Contreras by stating CalMat, despite any personal resolution by these employees, would continue to investigate the serious Contreras-Germann matter and would not abdicate its responsibility to do so. Dyer then requested Stillwagen "submit copies of any and all notes, minutes, transcript, correspondence, reports, memoranda, bulletins, flyers, E-Mail, or other documents which Local 36 possesses or can obtain which can relate to" four types of specifically detailed and described communications involving Germann and Contreras, and any such detailed communications between any other persons about them; as well as between any persons regarding a work slowdown. Dyer further requested a "detailed explanation of the 'misunderstanding and miscommunication' which you purport to have occurred between Mr. Germann and Mr. Contreras and detailed account of the meeting held in Local 36's offices today," setting forth specific questions to which, at a minimum, responses must be provided including whether Germann was admitting which allegation, and was Contreras retracting his allegations against Germann and admitting he made false allegations against Germann, and specifically which allegation was Contreras retracting. EX 60. Dyer did not set forth what the specific Germann, or Contreras, allegations were that he was referring to in this letter.

Dyer testified he wrote this letter because Contreras informed him Germann threatened him with union discipline and Dyer was concerned Stillwagen's letter might be a union attempt to sweep "this" under the rug and to put additional pressure on Contreras to drop anything.¹⁹ Dyer testified he wanted, by his 5/12/98 letter, to find out whether the 5/11/98 Germann-Contreras meeting was on the level and whether the union applied pressure to Contreras. Dyer further testified he did not drop the investigation on advice Contreras and Germann had settled the matter because "(w)e have our own moral and legal responsibility to investigate claims of the pattern of harassment." Tr. 648-651. Stillwagen by fax acknowledged Dyer's request stating he would try to answer Dyer's questions the best he could but indicated due to his schedule he would be unable to complete it until the following week. Dyer attested the Stillwagen response he received was the information Dyer sought did not, to large extent, exist.

Stillwagen's EX 63 5/15/98 written response did not reflect any of the statements Dyer testified Stillwagen made in their 5/12/98 telephone conversation, including the unclear "it" and "that" statements. The Stillwagen 5/15/98 written response did, in content, attempt to address some of Dyer's 5/12/98 EX 60 requests. Stillwagen, who had attended Dyer's 5/4/98 interview of Germann, where Dyer adjudged Germann evasive, stated he was not aware of the specific charges against Germann. Rather, according to Stillwagen, Germann on 5/4/98 denied threatening or harassing Contreras, and Germann and Contreras had asked if they could meet at the union hall to discuss a resolution. Stillwagen stated it was his understanding CalMat made no attempt to allow for dispute

¹⁹The record establishes Germann's statement as to taking Contreras to the union arose out of Germann's 4/24/98 hours violations complaint.

resolution between the parties. As to Dyer's work slowdown request, and Dyer's 5/12/98 reference to a Local 36 "work to rules" campaign, Stillwagen advised Dyer the union does not engage in such a campaign, and he assumed CalMat wanted all its employees to observe the employer's work rules as well as safe work practices. Stillwagen advised he was unaware of any deliberate act by Germann or any person to perform his duties inefficiently or contrary to rules, procedures or practice, or of any act by Germann or any other to encourage or intimidate another employee to so perform. EX 63.

Dyer testified he interpreted these Stillwagen EX 63 responses as an indication that since CalMat under the recently negotiated contract wasn't paying as much in wages and benefits, Cal Mat should expect less productivity from their employees and if the union was not actively participating in "our work slowdown, they were condoning it by inaction." Tr. 661. If Dyer had a specific basis for this stated belief as to a work slowdown other than what is reflected in the employee interviews evidenced in this STAA proceeding, Dyer did not enlighten further. Stillwagen further indicated in his 5/15/98 EX63 response it appeared CalMat was "dragging its feet in conducting an ongoing and never ending investigation in the hopes that, just maybe, it will find something," denying Germann the ability to provide for his family.

Fourth Week -- 5/18/98--5/22/98

Dyer's 5/18/98 letter to Stillwagen

One week following Stillwagen's 5/15/98 response letter, CalMat made the decision a disciplinary suspension would be imposed, and Germann could return to work the following Tuesday, 5/26/98, and so advised Stillwagen by voicemail. In the meantime, on 5/18/98 Dyer replied to Stillwagen's 5/15/98 letter setting forth the exact language of what was later incorporated into Allegations I-III of CalMat's 5/22/98 notice to Germann, initially stating 5/15/98 Dyer failed to see how Stillwagen could claim he was ignorant of the allegations against Germann as Stillwagen attended the 5/11/98 meeting with Germann and Contreras, and Dyer's 5/4/98 interview of Germann. Dyer, on 5/15/98, further stated since Stillwagen had failed to answer CalMat's important 5/12/98 questions about the union meeting, unless this requested information was immediately provided, Dyer would assume Contreras had not retracted nor Germann admitted any of Contreras' allegations.

Dyer in this 5/18/98 letter also stated Contreras told them he attempted to resolve his differences with Germann and merely received further such treatment from Germann as described in Allegations I-III. In fact, as found within, unless the specific basis of such a broadly stated 5/18/98 Dyer conclusion is set forth, based on the specifics of, and the details of the Germann--Contreras STAA testimony on their encounters 4/27/98-4/30/98 prior to oral suspension, and with their agreed testimony as to their last "pen gift" encounter, Dyer's 5/18/98 conclusory statement and representations here are not in accord with their representations.

Dyer's 5/18/98 letter also took issue with Stillwagen's 5/15/98 no "work to rules" campaign representations, referring to frequent flyers of unstated content turning up at CalMat, and Dyer wrote that since both Stillwagen and Germann had expressed the opinion the wages and benefits under the

new current contract were unfair, CalMat could only conclude Local 36 had acted in accordance with this principal and instituted its own beliefs as to a fair measure of (employee) efficiency by encouraging a work slowdown. Dyer further advised Stillwagen 5/18/98 if the allegations against Germann were true, the union had exposed itself to potential liability and CalMat had an interest in the matter due to legal, financial and ethical issues and would not let the matter be swept under the rug as Stillwagen was proposing. Tr 648-668.

5/18/98 Stillwagen Reply to Dyer's 5/18/98 Letter.

Stillwagen almost immediately responded, telling Dyer he was present at the beginning and at the end of the 5/11/98 Germann--Contreras meeting which was not called by the union, which was not a part of any charges brought by Germann against Contreras, and he prepared the Ex 59 letter they all signed to end the matter. Stillwagen stated he could not relate any conversations between Contreras and Germann when they met 5/11/98 since he was not at them. Dyer was free to assume what he wanted Stillwagen replied, but he would suggest Dyer contact Contreras and/or Germann about the contents of their 5/11/98 conversation resolving the matter between them. Stillwagen, in receipt of Dyer's written preliminary Allegations statement told Dyer that having been at Dyer's 5/4/98 interview, Stillwagen did not recall that Dyer on 5/4/98 then brought any specific allegations against Germann, but recalled Germann did deny saying or doing any of the things Dyer then asked him about 5/4/98. Stillwagen in 5/18/98 response took issue with Dyer's statements as to "slowdown" statements, actions and flyers, and told Dyer his stated equation of a belief in "a fair day's work for a fair day's pay" into a work slowdown was patently unfair.

5/19/98 Dyer Meets with Dickerson to Discuss Dyer's Recommendations on Investigation. Essentially those set forth in 5/22/98 notice. Tr. 671-672, EX 11..

5/19/98 -- CHP Revisits Site--Dyer Testified Visit Played No Part in Investigation. Tr. 569-70.

Dyer's 5/21/98 or 5/22/98 Meeting with Contreras. Tr. 673-679, Ex 73.

This is where Contreras told Dyer that at his 5/11/98 15-20 minute meeting with Germann, Germann told Contreras "I'm sorry, Tony, I hurt your feelings. I didn't know you that well," a meeting Dyer held with Contreras because he wanted to find out if any pressure was applied to Contreras in connection with the 5/11/98 resolution letter and the Contreras-Germann 5/11/98 meeting, ten days before. Dyer recorded Contreras as saying "(e)verything he told me is true--not retracting anything." Tr. 673. Dyer initially recorded 5/22/98 Contreras couldn't recall what happened with the "wet" cement load he had earlier accused Germann of causing, which reflects Dyer was on 5/22/98 continuing to seek fuller information on this Contreras allegation than he, or Dickerson, elicited in the Contreras interviews two weeks before. Dyer recorded that in this 5/22/98 meeting Contreras told him other drivers believed he was at fault in Germann's suspension and he told of a recent incident of another driver (Brothers) telling Contreras he made a mistake: if he wanted to work a lot of hours he should go to work somewhere else and he would be in legal trouble. Contreras said he

told Brothers he was going to sue Germann and he told Dyer he was crying in this conversation with Brothers. According to Dyer, while Contreras told him he could still work with Germann, he also told Dyer to tell Germann not to make fun of him and harass him for wearing the company's jacket. Contreras further told Dyer 5/22/98 he knew Germann had crossed his name off the Saturday overtime list. As of this interview date and further accusation, Germann had been suspended and assumably off the CalMat site since 5/1/98.

-5/22/98 Notice

One week following Stillwagen's 5/15/98 response letter to Dyer's 5/12/98 rejection of the 5/11/98 resolution letter, CalMat issued the decision a 25 day disciplinary suspension would be imposed and Germann could return to work the following Tuesday, 5/26/98, and so advised Stillwagen by voicemail. Cal Mat's 5/22/98 written suspension notice is reflected in part elsewhere within, and fully in footnote below.

This notice warned Germann any further violations of CalMat policy or the collective bargaining agreement would result in his discharge. And while his actions constituted grounds for discharge, CalMat advised it would give him another chance to save his job because: the "slowdown," Allegations III, occurred some months ago and evidence as to the specific allegation incidents reported indicated the employees did not actually slow down, fail to complete repair orders or wash their trucks. Further, Contreras had said he would work with him provided he didn't "commit such acts against him in the future, including harassing him for wearing his CalMat jacket"; and lastly, another chance was afforded because of Germann's length of service with CalMat. None of the described written Allegations referred to any CalMat jacket allegations by Contreras. Until the Dyer 5/4/98 interview, there is no indication Contreras complained to White, Dickerson, or Coley about Germann and CalMat jackets, and the Bruzzi notes reflect how this Contreras "rip off jacket" allegation was elicited. However the record reflects a past history of site union-management acrimony and differences of opinion among employees as to taking up CalMat's offer of free jackets with the company's logo or wearing a jacket with the union insignia, and past discussions between White and Germann over CalMat jackets.

This notice further advised Germann that because of the listed history of three written warnings in the past year, under CalMat's Work Rules Policy, indicated elsewhere as a progressive discipline policy, he was subject to discharge for any subsequent violation of this policy. Testimony establishes the listed prior disciplinary actions are in error. Three prior written warnings in this period were not issued. Further, Germann at hearing took issue with the listed 4/14/98 prior written warning of this suspension notice arising out of what, he testified, were White's misleading statements at the time as to what would be done given the underlying events.

Dyer, CalMat's witness, on redirect testimony on 2/26/98 testified Jack Gunther, the supervisor who asked the drivers to work overtime, had been disciplined with a letter to his personnel file. Tr 817-818.

Summary of Testimony Complainant Presented on Disparate Treatment

Testimony of Darrell Lewis

Darrell Lewis is a former employee of CalMat, currently employed as a teacher and highschool basketball and football coach. TR: 75. While working at CalMat in 1997 as a dispatcher, Lewis was involved in two confrontations with another employee, Tom Green. Lewis testified that Green, a bigger, very big guy, often “bad talked” him over the radio while other drivers could hear, leading up to their confrontation where White Sr. had to intervene. Green approached Lewis in Lewis’ office, where Green had no business being, and stood closely over him, commenting to Lewis in a manner Lewis regarded as intimidating. Lewis and Green had heated face-to-face words. Lewis and Green then “went to another room with Benny White and had a heated discussion,” containing swear words. Lewis did not recall any racial slurs being used. TR: 77-81. At one point the confrontation started to become physical, forcing White to separate the two men. TR: 78. Lewis’ supervisor and a sales manager talked to him about his actions, but he was not disciplined after this incident. TR: 80.

Lewis also testified about a verbal face-to-face confrontation with an employee named Bob Sengle. Lewis stated the two had an argument over Lewis’ advice as to assigned work and Sengle and some of the employees who witnessed this confrontation went directly to management afterwards. Lewis testified he was told to watch his temper, and Sengle was told to use proper procedures to register a complaint. Neither man was disciplined. TR: 83-84.

Testimony of Allen Buckley, Jr.

Buckley has been employed as a truck driver for CalMat for 15 years. He testified regarding a confrontation with a supervisor, Curt Hartwell. Buckley had been placed in Hartwell’s production department as a result of a layoff. Buckley, who is black, stated Hartwell said to him, “I’m tired of your shit, nigger, and I’m going to give you a pink slip.” [discipline slip] TR: 87. Buckley told the shop steward, who in turn reported the incident to the union. TR: 88. Buckley stated he also told “Digger” Stillwagen, a union official, who told Jack Ward, a sales manager. Buckley stated Ward contacted “the racial relations officer or somebody in LA. I never seen him. We had a conversation over the phone.” TR: 89. Buckley testified CalMat “took back the pink slip” that Hartwell had given him, and that to his knowledge Hartwell was not disciplined.²⁰ Hartwell has since been promoted. TR: 90, 87.

²⁰ On cross, CalMat’s attorney asked whether “the current management was in place” at the time of this incident. Buckley stated it was not. It is not clear what is meant, however, by “the current management.” CalMat did not elicit information as to whether there are different individuals currently in management, the management structure itself changed, or if there are different management guidelines currently in use.

Testimony of Robert Sengle

Robert Sengle has been employed as a concrete mixer driver with CalMat since July of 1996. TR: 95. Sengle testified he was involved in a confrontation with Darrell Lewis, a supervisor and dispatcher, in March or April of 1997. Sengle stated Lewis approached him and said Sengle would have to work the next day, which was a Saturday. Sengle asked whether Lewis would have to work, too, which set off a heated argument between the two men. Sengle testified Lewis called him a “white bald-headed m.f.”²¹ and threatened to take him outside and “kick his ... butt.” Another employee told Lewis he was out of line, to which Lewis replied, “I’ll take you outside and kick your M.F. butt outside, too.” Lewis then stormed out of the room, slamming the door. TR: 97.

Sengle testified he and the other witnesses went directly to Barry Coley’s office about the incident. TR: 98. Paul Hughes, a sales manager, took Lewis aside to talk to him, and then brought Lewis to Coley’s office. Sengle said Lewis apologized to everyone but him. Sengle was not disciplined. Coley told Sengle that Lewis was disciplined, but would not say in what manner. TR: 101.

Testimony of Jeffrey Winkler

Jeffrey Winkler has been employed by CalMat as a truck driver for about two years. Winkler testified about events he witnessed during a safety meeting in 1998. He stated that an employee named Mr. Shannon asked a supervisor, Dennis Bowman, if he had heard anything about Germann’s suspension. TR: 106. Bowman replied, “they’re going to get rid of all the troublemakers.” TR: 107. Bowman also stated that German had “brought it on himself.” TR: 108.

None of Winkler’s testimony is given any weight in evaluating the issue as to the pre 5/1/98 oral suspension and the events prior to written 5/22/98 suspension. Analysis and evaluation of the STAA testimony of the individuals involved in and with the pre 5/22/98 events, and the written pre 5/22/98 documentation form the basis for the findings reached on what transpired pre-5/22/98, the sole STAA issue here.

Testimony of Carolyn Vallese

Ms. Vallese, a mixer driver, was employed by Cal Mat in 1997. When Dyer came to San Diego to speak to other employees about the Germann-Contreras matter she asked to speak to him. She had had a problem with Contreras, where he harassed her, right after she started with CalMat. He kept asking her if she wanted to go to Tiajuana, did she need a boyfriend, he needed a girlfriend. Almost every time she saw him, whether in the driver’s room, out in the yard, or on the jobsite for the first two or three months she was employed, he approached her with these statements, and several others heard Contreras talking to her in this manner. She told Contreras she was married, she was not interested, and she was not going to Tiajuana with him. She testified she did not encourage

²¹ Mother fucker.

Contreras to talk to her this way. She testified she is not a prude, she was a new employee, and it is her policy in the male-dominated environment in which she works to try to get along and not be regarded as a woman who makes trouble, who takes issue with or complains about the talk in such an environment. She tries to handle such a situation, and tried to handle this situation herself. But it started to bother her. Her “no” responses to Contreras were not getting through to him. Tr. 878. Several times she discussed her inability to get through to Contreras with one of her co-workers, Ed Sigler, who had heard what Contreras was saying to her on numerous occasions and who was friendly with Contreras. Sigler said he would talk to Contreras. When Sigler explained to Contreras he could get in trouble for his harassing Vallese in this manner, she testified that pretty much put a stop to Contreras’ advances which were every time she saw him, although he did not entirely drop it. Tr. 877.

Vallese testified these occurrences so upset her she was crying when she related her experiences with Contreras in the 5/5/98 Dyer-White interview, although they had stopped a good while before the Dyer interview. She testified the only reason she brought these occurrences to Dyer and CalMat’s attention was because of what was then going on: CalMat’s investigation based on Contreras’ harassment statements. Contreras claimed he was harassed, but Contreras harassed her to the point of tears and she believed CalMat should know that. She told Dyer she wasn’t there to cause trouble or get anyone fired, the matter had been resolved. But she felt Dyer and CalMat should know her experiences with Contreras and how he had harassed her, what she had taken from Contreras, how Contreras acted in responding to her no replies and what she had to do to get through to him.

Vallese testified there was no way, from her conversation with Dyer, that Dyer could have concluded it was only a couple or three times Contreras approached her in this manner and refused to take no for an answer. She explained to Dyer it went on daily, for months; it was constant and persistent although she had responded to Contreras by indicating no, leave her alone, go about his business. She testified she did not and would not in the Dyer interview have said or given Dyer the impression, by what she did say and explain to him about the Contreras’ harassment facts she had to deal with, that she is the worst when it comes to flirting around about sex and that she may have encouraged Contreras. And she explained just how she conducts herself as a woman driver in the type of environment where teasing and joking occur. Tr. 865-879. She testified no one at the 5/4/98 union meeting said not to tell the truth.

Edward Sigler’s Testimony

Sigler, a CalMat mixer driver at the time of the incidents Vallese related, attested he observed that on the job every time Vallese was around Contreras would go right there, making suggestive remarks. It wasn’t just Vallese, Sigler testified. He observed Contreras tried to pick up all the women he could. Contreras’ remarks to Vallese, similar to what Vallese attested to, and including about sex, observed by Sigler, were constant notwithstanding Sigler observed Vallese was telling Contreras she didn’t like it and she wanted Contreras to quit. Contreras wasn’t getting her response, he wasn’t taking her polite no. Sigler testified he had taken Contreras under his wing so to speak, tried to help him out when he started with CalMat, and on occasion had a beer with him after work. When after

a couple of months he found Vallese crying one day because Contreras was not getting her stop messages, because Contreras was really bothering her and stressing her out with his talk and she did not want to go to management to create a problem, Sigel put his foot down. He testified he told Contreras he was out of line, Vallese didn't want Contreras talking to her at all, and Contreras got the message. Tr.880-85.

Further Evaluation

It is agreed Complainant engaged in protected activities known to employer when he was first orally suspended, followed by a disciplinary suspension on investigation, both adverse personnel actions. Employer contends Complainant has not established his prima facie case as there was no causal connection between his protected activities and these adverse actions, no protected activity retaliation or animus in these actions and competent evidence does not establish his protected activity was the likely reason for the adverse actions. Employer contends only where there is direct evidence employer's adverse actions were motivated by protected activity, only then does the burden shift to the employer to demonstrate it would have suspended the employee even if he had not engaged in the protected activity.

To establish his prima facie case on the causal connection between protected activity and the adverse actions, Complainant must present evidence sufficient to raise the inference the protected activity was the likely reason for the adverse actions. However the motives for adverse actions against employees are necessarily subjective and for this reason it is rare there is direct evidence of any connection between an employee's protected activities and adverse action against an employee. But it is well established such a connection can be proven by circumstantial evidence. Ellis Fischel State Cancer Hospital v. Marshall, 629 F.2d 563 (8th Cir. 1980); Mackowiak v. University Nuclear Systems, Inc., 735 F.2d. 1159 (9th Cir. 1864). The presence or absence of a retaliatory motive is a legal conclusion and is provable by circumstantial evidence even if there is testimony to the contrary by witnesses who perceived lack of an improper motive. As Ertel and Kovas indicate, it has been held the proximate timing of the protected conduct and the adverse actions can be sufficient to raise the inference of causation.

CalMat contends they promptly, by White's actions, investigated Germann's protected activity complaints and it was only when Contreras, during White's investigation, volunteered his harassment and distress feelings to White that Cal Mat by White's and Dyer's actions, handled Contreras' complaint. This was what motivated CalMat adverse personnel actions, not Germann's protected activities which played no part in the 4/30/98 suspension decision. Contreras' 4/30/98 complaint of repeated harassment, defined by CalMat as Germann's repeated references to Contreras over the four days 4/27/98-4/30/98 as a "m-f, sob, chihuahua" alone resulted in the suspension actions. By these actions Complainant crossed the line of decency in violating its EEO policies, its Work Rules, Code of Ethics and his own union rules. He is a bully, a hothead and a racist, and on Contreras' complaint CalMat suspended him. It is argued Germann was not concerned with "safety," he is a racist who engaged in a continual pattern of harassment of a Mexican-American who would not bow and scrap to his union authority, who was not as pro-union as Germann was. CalMat's lack

of protected activity retaliation is, it is argued, reflected in its “model handling of Contreras’ harassment complaint.”

What does the record show in connection with Complainant’s *prima facie* case?

First, the timing of Germann’s suspension, on his reporting to work 5/1/98, four days after his protected activities overhours complaint to Coley and Hughes, and two days after his continued pursuit with White of the management circumstances resulting in the overhours violations, on no further advice as to the CalMat investigation promised by Coley three days before. In its temporal relationship, these are strong circumstantial factors inferring protected activities causation, that the 4/27/98 protected activities and their continued pursuit 4/29/98 played a part in the 4/30/98 decision to immediately suspend.

Then the presentation of what occurred 4/30/98 and 5/1/98, evidenced by CalMat’s recordings and the testimony of Coley, White and Dyer as well as Contreras, constitutes circumstantial evidence on the causal nexus of Germann’s 4/27/98 and 4/29/98 protected activities’ complaints as a factor in the adverse action taken 4/30/98.

First, while Contreras testified he went to White 4/30/98 to complain about Germann, in fact this is not true. What this presentation indicates happened is White had to recontact Contreras and Scott because of Germann’s continued pursuit of the overhours violations with CalMat management, including pursuit of the management circumstances giving rise to them 4/24/98 voiced to Coley 4/27/98, by Germann’s uncontested testimony. Because shop steward Germann continued to pursue Coley’s promised investigation of the 4/24/98 management circumstances causing the safety rules violations, not alone the bare facts of the violations but Gunther’s refusal to take no for an answer from drivers who would violate the CHP trucker safety rules if they did what Gunther requested. This is a fact which by Germann’s uncontested testimony was brought to his attention by, and known to other CalMat employees including drivers who refused to violate the safety rules as Contreras and Scott did 4/24/98. As to the circumstances of the 4/24/98 violations, these Gunther actions are facts of record in this STAA proceeding, from Contreras’ and Scott’s statements and reasonable inferences from the specifics their statements supplied as to what occurred 4/24/98, supportive of Germann’s testimony.

Then by what White recorded on his 4/30/98 Contreras conversation, White did not elicit or solicit any information from Contreras about the circumstances causing and surrounding Contreras’ 4/24/98 violations of the driver safety overhours rules, the subject of Germann’s protected activities complaint to CalMat management voiced both on 4/27/89 and 4/29/98. Rather, White instead solicited Contreras’ advice he was not tired and he felt safe to help the company 4/24/98 and this was the reason he violated the safety rules. White then went on to record two reported Germann “mf sob” name calling incidents. First on 4/27/98, and then in the 4/28/98 “window” event, the only two “mf-sob” name calling incidents Contreras then reported, with Contreras reporting he was also called “chihuahua” in the first. The information White did record, as to Germann telling Contreras

he was going to report the safety violation wrong he did to the CHP and the union, reflect Germann, in these two incidents and known to CalMat, was expressing to Contreras and CalMat protected activities concerns and pursuit. Not dissimilar to what Germann testified occurred, but for the derogatory terms, in these two encounters, which Contreras in reluctant manner confirmed occurred at STAA hearing.

Then there is the fact White at the time of his 4/30/98 recontact with Contreras and Scott was the CalMat manager unavailable to drivers who on 4/24/98 had concerns about Gunther's requests which would violate the driver safety rules, concerns about Gunther's refusal to take no for an answer in such circumstances. White was also the manager in charge of supervisors unavailable when sought by a driver concerned about a manager's 4/24/98 overhours request. This information, presented at STAA complaint hearing, would assumably be part of what would be reportable to White's upper level managers if the circumstances Germann was pursuing were fully developed.

Then, while White testified he notified Gunther's superior of the overhours violations, the inference from his limited presentation on this fact is he related only that the violations occurred. He reported only that the drivers hours exceeded the 15 hours and was a rules violation, ascertained from White's time card review and his first contact with Scott and Contreras where the detailed circumstances of what occurred the night of 4/24/98, the focus of Germann's protected activities complaint to upper CalMat management, were not secured/elicited by White.

Then there is White's contemporaneous 4/30/98 recording which indicates White invited Contreras to talk to Dickerson. And there is Contreras' testimony White's initial response to him in their 4/30/98 conversation was he would speak to Germann about what Contreras related, which White did not do even at 5/1/98 oral suspension. And there is the void in Contreras' and White's testimony as to how White's advice he would speak to Germann evolved instead into White's taking him to a visit with "upstairs" higher management.

Then there is the indication Contreras spoke to Dickerson alone. Coley, the recipient and knowledgeable as to Germann's protected activities complaint and its focus, which were the context in which what Contreras related to White had occurred, was not part of this conversation. What Contreras said to Dickerson in this conversation is unknown from the presentation but inferentially Contreras related no more than recorded 4/30/98 as to incidents where he was called derogatory names: two incidents. There is no indication Dickerson knew or elicited from Contreras the surrounding circumstances of whatever Contreras told him about the two "m-f, sob" incidents which included the "window breaking" and also the "C" incidents. The context Dyer agreed must be known to adjudge the seriousness and significance of such verbiage's usage. Or what, if anything, Dickerson was advised by Coley or White as to Germann's 4/27/98 and 4/29/98 protected activities complaint to management, the foundation of White's 4/30/98 recontact with Contreras. But by CalMat's 5/1/98 recordings, Dickerson told Dyer the incidents of his talk with Contreras occurred on two days, which is just what White's reflected 4/30/98, two morning incidents. Only these could

be the basis of CalMat's representation of "repeated" derogatory epithets as of 4/30/98 and 5/1/98.²²

Then in testimony and later post 5/1/98 recordings, the occurrences of such incidents were expanded by Contreras and CalMat into two more incidents. The timing and circumstances of these belatedly recalled additional occurrences bear on Germann's *prima facie* presentation of a causal connection between his protected activities complaints and the adverse suspension actions.

And while employer urged it was not Dyer's responsibility to investigate Germann's protected activities complaints, that was White's to do and he did take care of that, what this record reflects White did does not indicate he solicited or conveyed the information as to Gunther's actions which this STAA proceeding, by Contreras' and Germann's testimony, and Scott's statements the next week to Dyer/Buzzi, indicate occurred 4/24/98. The presentation indicates any information White secured and conveyed was based solely on the timecard/job tickets facts and not on how the requesting management official secured the drivers' violations. One hour after White initiated his 4/30/98 recontact with Contreras, having in the meantime brought Contreras to visit higher level management officials, by White's recordings he did not then seek any information from Scott as to the Gunther 4/24/98 violations circumstances, the focus of Germann's protected activities complaint. This was the ostensible purpose of White's 4/30/98 recontact with the involved drivers, on Germann's continued complaint pursuit. Rather White then questioned Scott as to whether Germann threatened him. What White told Dyer he did on this Scott recontact, note jottings at EXs 17,18, is contrary to what White's 4/30/98 recordings reflect he did in talking to Scott that afternoon. This infers White's 4/30/98 purpose was not to investigate Germann's complaint Gunther pushed or pressured the drivers into the 4/24/98 violations but to investigate Germann, another temporal relationship factor supporting Complainant's *prima facie* case.

Then there is Moss' testimony which contradicted White's that he did not indicate to Moss he knew Germann was the CHP complainant. And there is Moss' testimony White indicated he and the employer were under some pressure to make up work. Moss, a witness totally uninvolved in the CalMat history and the employer-employee disputes reflected and alluded to in this record, had no reason to misstate under oath what White told him. Or to testify White did not, even after Moss' explanation, correctly advise the drivers as to how the CHP rules, the subject of Germann's protected activities complaints, applied to the CalMat's drivers' work-driving circumstances.

While employer argues White investigated the overhours violations and Dyer investigated Contreras' complaint about Germann's derogatory language/harassment, and these were two different subjects and investigations, the record reflects and infers that in determining the total context of the contested words/actions, they were inextricably intertwined. In this connection there's White's testimony he, as the transportation manager charged with the overhours investigation and advice to drivers on the safety rules, did not know if Gunther had been disciplined for his 4/24/98

²²It is noted that while White recorded 4/30/98 Contreras said he was thinking about quitting, by Coley's testimony Contreras' "thinking about quitting," a factor employer emphasizes as to Contreras' state of mind was only implied to and by Dickerson. Tr. 336.

actions. Followed by Dyer's testimony, elicited in the manner noted, that Gunther had received a written reprimand. This bifurcation representation/attempt has some weight in prima facie consideration as circumstantial evidence of protected activities' causation. Knowledge of such a discipline fact would appear to be of some significance to a transportation manager supervising drivers subject to such managers' overhours violations' request. Dyer was statedly not involved in the overhours investigation which was White's charge from Coley, and Dyer had no operational effect on drivers who might be subject to such importuning to violate the driver safety rules. Yet White, responsible for drivers' operations and supervision, by his testimony was left in the dark as to outcome of the drivers' overhours investigation. CalMat's presenting this information in this manner left the impression this Gunther discipline occurred after White's testimony.

Then with only two derogatory language incidents related by Contreras 4/30/98, there is the different manner in which White did not engage Human Relations or upper CalMat management, the different manner in which he handled the vulgar derogatory language and physical altercation incident he witnessed between Lewis and Green, with a known history of public derogatory remarks between these employees. And the indication Lewis' cursing, racial slur and physical threats did not result in any discipline and the indication Buckley's formal union complaint about Hartwell's racial slur did not result in discipline of supervisor Hartwell.

Then there is the fact this employer 5/1/98 immediately and summarily suspended a 15 year employee with no prior history of any such activities, actions or such derogatory language directed to any employee which Contreras, a relatively new employee, voiced 4/30/98. Germann, an elected shop steward, had a long history of working with an assumably multicultural diverse San Diego work force, with no similar such derogatory language/sabotage complaints. This immediate suspension taken based on accusations voiced in the circumstances this record reflects occurred in the 4/30/98 meetings: first between White and Contreras, then Contreras and Dickerson followed by Coley's and Dickerson's discussion, and with no Contreras indication anyone heard what Contreras alleged Germann said to him, with a lack of the corroborative-type evidence Dyer testified CalMat had in the very few instances he could recall of immediate suspension pending investigation, with the cryptic manner in which White advised Germann of his suspension, all serve as circumstantial indications from which to infer a causal relationship to Complainant's protected activities complaints to Coley and White on 4/27/98 and 4/29/98.

Then there is the fact Dyer waited more than eleven days to secure possible corroboration of Contreras' truck sabotage accusation made to White and Dyer. This accusation would, by its seriousness, appear to necessitate the company's quickest possible investigation while records/memories from possible corroborative sources, such as from the batch plant as to water in the drum, were fresh.

Then there is the general void this record reflects as to the substance of White's preliminary contacts with the various employees selected for Dyer's interview in the post 5/1/98 period. Further, contrary to Coley's testimony, there is the recording Coley was actively involved in directing employee interviews, another circumstantial factor.

Then there are the various facts Dyer's testimony and post 5/1/98 recordings indicate occurred in the course of his investigation the next week 5/4/98 through 5/8/98, by his readings of the investigative "jottings" and remembrance interpolations, not necessarily in accord with the jottings themselves or the only interpretation of the, at times, ambiguous statements reflected as elicited in a generally leading and sometimes suggestive fashion. In several regards, the model post-oral suspension investigation gives pause as to its reliableness, thoroughness and focus. When all these facts are viewed with the very close temporal relationship of the 5/1/98 suspension to the protected activities and the fact the suspension arose out of and was intimately intertwined with employer's investigation of Germann's protected activities complaints, and when viewed with what occurred during the investigation further elaborated on below, in the factfinder's opinion sufficient evidence has been presented from which to infer a strong connection between Complainant's protected activities and the 5/1/98 and 5/22/98 adverse actions.

It is found and concluded Germann has established his *prima facie* case. It is found and concluded he engaged in activities protected by the STAA; CalMat was aware of these protected activities; he suffered adverse employment actions and there is sufficient evidence presented to raise the inference Germann's protected activities were the likely reason for his 5/1/98 oral suspension and 5/22/98 disciplinary suspension after investigation.

It is further found and concluded CalMat has presented evidence Germann was suspended for legitimate nondiscriminatory reasons. The record reflects employer had written EEO policies, Work Rules and a Code of Ethics, known to all employees, warning of disciplinary action in the event of their use of the language, the obscenities and ethnic slur Contreras stated Germann directed at him in his encounters with Germann in the four days 4/27/98 through 4/30/98. Employer has made a showing sufficient to meet its burden or producing evidence of lawful motive for the adverse actions taken.

Pretext and Dual Motive Analysis

As indicated above Germann can prevail if the preponderance of the evidence shows either the reasons given for the adverse actions against him were a mere pretext or his protected activities were the more likely reason for the adverse actions. Alternatively Germann can also prevail if he can show his protected activities were at least one of the motivating factors in the adverse actions and CalMat fails to show by a preponderance of the evidence it would have taken the same actions even in the absence of the protected activities. In such a "dual motives" case, the employer bears the risk that the influence of the legal and illegal motives cannot be separated. Pogue v. U.S. Department of Labor, 940 F.2d 1287, Cir. 1991).

Analysis and evaluation of the record, above and below, reflect as follows: The ethnic slur/obscenities Allegation I basis for both suspension actions is, like the sabotage Allegation II, essentially Contreras' word against Germann's. The employer's position is the adverse suspension actions at issue were based on the Contreras harassment of Allegation I; the "slowdown"

contentions of Allegation III while they played a part and made a difference in the action taken, they were not central to the suspension.²³ Since however both Allegations II and III were set out in the suspension notice, and Allegation II was an integral part of Contreras' 4/30/98 statements and those of the CalMat officials White and Dickerson, conveyed to Dyer and investigated by Dyer during the period prior to 5/22/98, under applicable case law criteria consideration of Contreras' harassment allegations necessitates all the allegations voiced at that time and all the Allegations set forth in the notice be evaluated as all of these events and accusations were part and parcel of the events which resulted in the suspensions. And all ensued from Germann's protected activities, and from information secured in this very limited, less than one month period 4/27/89-5/22/98. This is the only period in which events transpired which affected the suspension decisions CalMat made 5/1/98 and 5/22/98, and this is the only time period which has a bearing on what occurred on the sole issue here, suspensions in violation of the STAA.

The Allegation II sabotage accusations of the suspension notice, assumably the threats of White's cryptic 5/1/98 advice to Germann, on which CalMat found the evidence to be inconclusive were based solely on Contreras' accusations. Sabotage was not mentioned in testimony. The fact Contreras would make such accusations which could not be corroborated, which CalMat made no attempt to immediately investigate, with delay in securing any batch plant information until 5/11/98, is noted in evaluating Contreras' testimony and the motivation for employer's actions. It is also noteworthy Contreras would again, on 5/22/98 and without support accuse Germann, suspended from the work site at that time, of crossing his name off the overtime list. This was at a time when Contreras was reporting negative feedback from other drivers as a result of the events this record reflects ensued followed the 4/24/98 overhours violations, and historical differences among the several drivers' factions predating the 4/24/98 events.

Then, as to the "slowdown" acts of Allegation III, analysis of the record and particularly review of the employee statements against Dyer's readings, his recollections and interpolations, reflect these are essentially Contreras' allegations. Review of the statements and testimony of the other employees Dyer attested he relied on, Castro and particularly Blackman and Bowman does not reflect, either in the manner these employees were questioned or necessarily in the statements and recorded jottings as elicited, that this is what they said Germann did, or that they were accusing Germann of these Allegation III acts. From such ambiguousness Dyer, having initiated, raised and developed this area on his own, or as directed given Coley's input post 5/1/98, interpolated his conclusions. Conclusions which on consideration of Dyer's testimony are adjudged not reliable

Vallese's testimony, corroborated by Sigler, establishes Dyer's notes and recollections do not correctly or necessarily reflect what the interviewed employee said. Vallese's testimony, that of a credited in-person genuine witness who had nothing to gain and much to lose in coming

²³Tr.25-28, employer's pre trial brief.

forward,²⁴ reflects on the reliableness and credibility of the post 5/1/98 investigative methodology, as well as on the trustworthiness of the purported statements and represented conclusions from this methodology. Vallese by demeanor and substance was no “plant” and her purpose in coming forward was not to hurt Contreras but to tell the truth, based on her and Sigler’s personal experience with Contreras. Vallese’s testimony on the details of what she told Dyer Contreras had done and what he was like to deal with, reflected adversely on the reliableness of the post 5/1/98 investigation methodology/representations/interpretations/interpolations and conclusions. Vallese’s and Sigler’s testimony indicates, as well, that Contreras was an individual difficult to get through to, who has his own ideas as to what he will continue to do. Not unlike what Germann represented occurred in his Contreras encounters where his stated purpose was to “counsel” Contreras on why he should not violate driver safety rules when requested by a manager in the circumstances Germann had been given reason to believe occurred.²⁵

At times throughout this proceeding when the Dyer/Bruzzi “note jottings” are compared to Dyer’s testimony on these interview statements and his attested recollections, the fact finder’s impression is Dyer read into these interviews what wasn’t stated, or unambiguously stated. As he read into Vallese’s that she said she flirted with Contreras. And/or that Dyer interpolated conclusions from ambiguous, or cryptic or deflected statements or responses to his leading and/or suggestive questions in the areas he attested formed the basis for his Allegation III “slowdown” conclusion, including repair write-up, vehicle washing and unspecific “flip offs.”

After Dyer led Contreras in the 5/4/98 interview by stating he was a guy who didn’t have a big ax to grind with the company and had Germann asked him not to do anything for the company, and further led him by first telling Contreras Germann didn’t want the employees to work hard, EXs 25, 26, Contreras then related the “slowdown” information Dyer adjudged very credible. Yet during this interview Contreras never related to Dyer the 4/30/98 apology he had received from Germann. The apology was not related until the next day when, it appears, Contreras first related in one of their encounters Germann did advise Contreras, as Germann testified occurred, that Germann wanted Contreras’ cooperation in a write-up of the 4/24/98 violations’ events for his complaints about Gunther’s actions. EX37. One of Contreras’ co-workers in interview jottings described Contreras as an employee who wanted to work as many hours as he could, and Contreras described himself to an interviewed co-worker as a company man.

On the controversy as to whether “chihuahua” is an ethnic slur, any word with even the slightest reference to, or implication of one’s ethnic or racial origin, said in anger and/or directed

²⁴Including peace in the work environment this record reflects.

²⁵While it is indicated Contreras in the first Germann-Contreras encounter was apologetic for his 4/24/98 actions, part of the evolving discussion between them at the time involved how drivers’ should respond to management’s requests to violate the driver safety rules. About this they differed, Contreras indicating the company’s request and need determined what the driver would do.

at any individual in derogatory or demeaning manner can be an ethnic/racial slur. The context and content, the attendant words and the circumstances in which such words are uttered, how they are uttered, are factors for consideration

. And as to the “m-f sob” profanities, there is a difference when these words are uttered generally by a vulgar mouth in the course of speaking, as compared to when these words are directed at an individual such as is reflected in the conclusion without specifics of the Allegation I charge; in the specifics of the Buckley-Hartwell and Sengle incidents and the specifics of the Lewis-Green incident which White broke up. And as Bowman told Dyer when interviewed, the trucking industry is a course one. Bowman advised he doesn’t listen to some of the name calling and employees have to vent without getting physical.

So in the face of these stated and offered legitimate business reasons, in adjudging the evidence on the issue of claimant’s burden to establish the protected activities were more likely than not the reason for the adverse suspension actions, the context and total content of the circumstances in which all these words were uttered have to be known and considered. As on a dual motive analysis such must be known and considered to determine if the employer’s burden of persuasion is met, if it would have taken the same actions even in the absence of the protected activities.

Since the derogatory profanities-ethnic slur of Allegation I are essentially Contreras’ word against Germann’s, with no one else privy to their conversations, the result is no one can know or adjudge with any certainty or on a more likely than not basis, whether and when the three words of Allegation I were directed at Contreras in derogatory manner. Only Contreras and Germann know. However CalMat elected to immediately suspend based on Contreras’ word alone and then after more than three weeks on suspension to finalize a more than 22-day without pay suspension based on Contreras word and Dyer’s opinion following investigation Contreras was very credible.

CalMat points out English is Contreras’ second language. However, notwithstanding this fact Contreras, in person, by how he expressed himself on the stand, by what and how he said it, conveyed the impression he is a man who does not lack the ability to express himself, and to do and to say what he wants or what will achieve his own interests in any circumstances in which he finds himself. He impressed as well able to judge the situations this record reflects he played a part in and was placed, and to act to serve and express himself as he wants to.

Contreras’ in-person impression of a man well able to handle and represent himself to serve his purpose, a man who does what he wants to do was reinforced by review of what Contreras said in the several post-5/1/98 interviews. It was reinforced by review of what the CalMat records reflect his co-workers said he said to them through 5/5/98 about the Germann--Contreras encounters which served as the basis for Germann’s immediate suspension, although generally not date specific as to when said over the relatively short 4/27/98-4/30/98 time period so recent to the interviews. This impression was reinforced also by Vallese’s and Sengle’s testimony.

Contreras did not come to White to complain about Germann as he testified and in his

4/30/98 statements to White and to Dickerson on the Germann encounters in which these words were used, Contreras related only two encounters, with “chihuahua” used in one. It was only after Germann had been suspended, after Contreras had had his visit with upper level management and after the Dyer investigation was set in motion that Contreras days later related two other such encounters, neglecting to advise CalMat of the Germann apology until second interview. By the CalMat recordings and arbitration testimony, these additional incidents were related in as general a fashion as his STAA testimony. These unexplained facts do not well serve Contreras’ credibility.

The lack of details as to the context, circumstances and content of most of his several Germann encounters in the four days before White spoke to him 4/30/98, and particularly Contreras’ post-5/1/98 addition of two more such incidents, with his testimonial verbalization of only “all this stuff” may be a function of how the questions on these events had been asked by Dickerson and Dyer. While in no manner should this evaluation be viewed as holding a witness or speaker to full or complete details or information as to events or statements, nevertheless some information other than generalizations should be disclosed to convey an appreciation for the context and circumstances in which the charged statement were voiced. Contreras’ testimony did not overall impress as fully reflecting the context in which the controverted profanities and “chihuahua” were expressed, and his testimonial representation Germann approached him with no preliminaries, for no reason and solely to direct these words at him is not credited. His own testimony as to one such occasion would reflect Contreras preliminarily approached Germann for some unstated purpose.

The various employee interviews indicate Contreras, in relating to his coworkers his four day experiences with Germann did not consistently report that they were acrimonious, with Germann swearing at him and calling him “chihuahua.” But to some he did report acrimony and cursing, to few did he report the “chihuahua” and some of Contreras reportings to fellow employees occurred after Germann had been suspended and before Dyer’s interviews. Tr. 428-29. Contreras was selective in who he reported to and what he reported. To only Ellwood did he state Contreras flipped on his water valve and flipped his throttle. Ellwood did not reflect this under oath at arbitration. And to one interviewed employee Contreras gave the impression Contreras blew up at at Germann, which may also be the implication of the abovenoted Germann remark in the Castro interview.

Moreover Contreras failed to tell employer until 5/5/98 that in their last not unfriendly encounter prior to Germann’s suspension, Germann had told Contreras he was sorry he had hurt Contreras’ feeling, a fact of no significance to CalMat when they decided to continue Dyer’s investigation and Germann’s suspension until 5/22/98. This Germann pre 5/1/98 apology to Contreras, like their 5/11/98 letter of resolution, made no difference to employer’s pursuit of evidence to support the suspension, or to the level of severity of the disciplinary suspension ultimately imposed 5/22/98, more severe than imposed in the Lewis-Sengle or Buckley-Hartwell incidents, or on Gunther.

Contreras’ testimony and the post 5/1/98 manner of securing and recording Contreras’ statements to Dyer on the additional Germann-initiated incidents beyond the initial encounter of

4/27/98 and the early a.m. standby knock on the window incident, including any of the other encounters where Contreras testified Germann directed the derogatory words of Allegation I at him do not persuade that in fact Germann initiated these encounters or directed any of these words at Contreras in any derogatory or “in your face” manner as described by Dyer.

In this regard Contreras testified Germann told him he had no “huevos.” But White’s 4/30/98 statement contains no indication Contreras told White Germann said this; nor does Dickerson’s 5/1/98 advice to Dyer. This word, and its reference, is not one to be left out of a derogatory language recitation four days after its utterance, if actually stated as testified. But the “note jottings,” by content and inference, reflect these words evolved during Dyer’s questioning, four days after Germann’s removal from the work site based on Contreras’ visit to “upstairs” CalMat managers, when Contreras knew he had their support. While Contreras may believe this was the import of Germann’s statements as to how Contreras handled Gunther’s request, the word attributed in testimony to Germann evolved in and from Dyer’s manner of interview.

Then there is White’s testimony, led on direct in employer’s presentation, that an employee, Morgan, approached him just the day before White’s STAA testimony, to volunteer he had “some time ago” referred jokingly to Contreras as “Chihuahua.” For this he apologized to Contreras when Contreras “seemed to take offense to that. Tr. 311-12, 327-28. The timing of White’s securing this information and this Morgan approach, as represented at hearing and on overall evaluation, struck as odd and disquieting given the information sought on this word’s work usage in Dyer’s investigation. White’s testimony as to his belated acquiring of this information did not serve to enhance his credibility. It is a circumstantial factor bearing on employer’s investigative motive. And it is noted it was only after Germann on 5/4/98 advised Dyer Contreras had been called “Chihuahua” at work, a fact not mentioned by Contreras the day before or its work usage then questioned by Dyer, that Contreras on 5/5/98 reinterview advised he had been called “Chihuahua” at work. By Morgan, a couple of times and jokingly. Contreras did not on 5/5/98 indicate any Morgan apology, or in his testimony any stop request of Morgan. Tr. 254-55.

These are among some of the reasons Contreras’ testimony, these CalMat recordings and Dyer’s testimony give pause to an evaluator in determining reliableness and trustworthiness.

White’s presentation and the evidence in its entirety reflect it was White’s recontact with Contreras, which immediately preceded Germann’s suspension, White’s necessity to follow up on Germann’s continued pursuit of the management actions which caused the overhours violations, which resulted in the information White secured from Contreras, the basis of Germann’s immediate suspension and Allegations I. Based on only two occasions, on successive days, plus the sabotage accusations.

However as of this White interview White knew, from Germann himself and from Contreras, that Germann intended to pursue not only the internal complaints he had made to CalMat management, but complaints to the CHP, DMV over the safety rules violations and management’s handling of his complaints, and that he would engage the union on these overhours violations by

union members at management's request, all arising out of and founded in protected activities under the STAA, the trucker driver safety rules.

White had previously told Contreras he did a good job for the company when he violated the driver safety rules under the circumstances of Gunther's requests, albeit he told Contreras it was wrong. And his 4/30/98 questions of Contreras could leave the impression, including with Contreras, the importuned driver's judgment as to fatigue and the importuned driver's determination it is safe to do so determines whether he should accede to a manager's request, or direction he should do his job, having turned management's initial request down because safety overhours violations would result. White in this conversation, and by what he said to Contreras in his initial contact, was sending mixed messages to Contreras. Pushed is a word which tells little and is a conclusion unless details are elicited as to what actually happened in the 4/24/98 Gunther requests and events. And by what is presented in this record White's investigation of the overhours violations was superficial.

White did not handle Contreras' accusations of derogatory profanities in two incidents on two successive days including the ethnic slur accusation the way he and CalMat management had handled not so dissimilar employee exchanges, notwithstanding EX2 and Human Relations' function. Tr.309:19-310. Exchanges where there was direct corroborating evidence, as in the Lewis-Sengle incidents presented.

Against these factors, the factfinder is persuaded as follows given the timing and circumstances of the oral suspension and both White's and Contreras' manner and impression on testifying: It was at Transportation Manager White's behest and suggestion, and not on any Contreras complaint or request that White took Contreras to upper management 4/30/98. This occurred in a conversation with Contreras ostensibly about Gunther's having pushed the safety rules violations, but which elicited no information on which any judgment as to this fact could be determined. A conversation which drew Contreras out on Germann, but without any attempt to secure any or full details as to how the violations occurred or the circumstances in which the derogatory words/slur and sabotage occurred. In a conversation where White knew such accusations were part and parcel of events which Germann had advised both White and Contreras he was pursuing to outside authorities as safety violations in which Contreras was a percipient player. Employer's presentation does not persuade that Contreras' "complaint" about Germann, the basis on which they represent their suspension actions had to be taken, was an unsolicited and uninvited action by Contreras.

CalMat argues Contreras complained to his union as evidence of the Germann harassment for which the suspensions were imposed. Contreras testified he sought Ward because Germann was "bothering" him. He testified this occurred before Germann's first apology. Contreras did not delineate how he described Germann's "bothering" to Stillwagen. He left unclear whether this contact, because of Germann's "bothering," was due to Germann's cursing him, or because Germann told Contreras he was taking him to the union because of his overhours violations and whatever were Contreras responses to Germann when they discussed the driver safety rules during

which Germann made the statement about Contreras working elsewhere if Contreras did not want to follow the safety rules as the Teamsters did. Contreras' quitting references, which assume significance in employer's arguments, arose out of the Germann-Contreras driver safety rules and violations discussions and how to handle a manager's request to violate the rules. To the extent Contreras' testimony tied his quitting reference to his crying wife and children so affected by his advice to them of Germann's complaints about the violations, this struck as embroidering by Contreras, an impression enhanced by the Vallese-Sigler presentation..

White elected not to resolve the matter between Germann and Contreras in the manner he had at first told Contreras he would, and had done in a prior employee swearing at/slur utterance situation. White, the investigator of the safety rules overhours violations took Contreras to higher management officials having conducted no investigation on the focus of Germann's protected activities complaint and without securing the "pushing" specifics and circumstances disclosed in Dyer's investigation and STAA presentation. With Coley's involvement in the subsequent Dyer investigation, contrary to his testimony, Coley who well-knew the basis of Germann's protected activities complaints which involved Contreras, and given the way Coley testimonially reflected his discussions with Dickerson and what transpired at "upper management" on White's arrival with Contreras, three days later, the record in its entirety does not persuade on a more likely than not basis and by the preponderance of the evidence that Germann's protected activities complaints, notwithstanding Coley's disclaimer, did not play a part in the decision to both immediately suspend and later impose the disciplinary suspension.

The fact finder's reservations as to the manner in which Dyer conducted, recorded and recalled the employee questioning, and on the investigation, an investigation in which White, on a basis unattested to by White, advised Dyer/Bruzzi pre-interview which employees to question, and contacted and talked to these and other employees, have been set out above. Then in evaluation Dyer's actions in response to the 5/11/98 letter of resolution and his statements to Stillwagen are also weighed to determine both Complainant's burden of persuasion as well as whether employer, in the absence of Germann's protected activities, would have taken the adverse suspension actions

At hearing when Dyer was questioned as to his "work to rules" references he indicated he did not include in this term the safety rules which are the subject of STAA protection and at issue in Germann's protected activities complaint. However Dyer's testimony at times left the uneasy impression this witness was melding his view of his "work to rules" expressions, which he described as a slavish adherence to work rules so as to slow the company's operations, with the driver safety rules which gave rise to the 4/24/98 violations, ensuing events and this proceeding.

It was on detailed review of how Dyer conducted the employee interviews of his investigation and when his testimony on these interviews and the information he testified he secured was measured against this documentation, including on the "slowdown" factors of Allegation III; and when how he responded to the 5/11/98 resolution letter and to Stillwagen's inquiries and responses thereafter, was compared to how he recorded and viewed Vallese's detailed statements to him on the specifics of Contreras' conduct, that Dyer's manner and purpose of in his investigation gave even

greater pause.

Dyer's Stillwagen correspondence, part of his suspension investigation, reflects Dyer injected into this investigation his and/or CalMat's beliefs from the recent past history between the union and company in contract negotiations. Stillwagen's response to what Dyer stated transpired 5/4/98 when Dyer questioned Germann in his presence, by Bruzzi's note jottings, impresses as a fair statement as to how Dyer conducted this interview. Dyer's reactions to the 5/11/98 resolution letter with his EX 60 discovery-type requests, have an adversary flavor, with Dyer's letter injecting past contract history and current union-management difficulties into this investigation. It echos the impression from Dyer's suggestive interview questions on which the "slowdown" charges were based, and his pursuit of the CalMat jacket topic with Contreras, pre and post 5/11/98 resolution letter, the jackets a past contentious union-management issue.

Dyer did not come to the Germann investigation as an outsider or disinterested party. He knew and had been involved with Germann in the recent past, on union-management negotiations. Evaluation of Dyer's manner of recording the investigation does not hold him to a verbatim recording of the employees' statements. However given how his testimony on his interview recollections against the jottings impresses, the grave reservations it at times raises, it would appear a longstanding Human Relations investigator would memorialize statements made in a fashion better reflective of what the interviewee said, with more precision, either at interview or in relative contemporaneous write-up from raw note jottings. And while Dyer testified his standard procedure is to advise the employee at interview's outset that his statements will not be the basis for action against him, the recordings do not so indicate. As complainant pointed out, at the time of the interviews and questions about the use of "chihuahua" it was known at the site that Germann had been summarily suspended because of an accusation such had been used.

A disciplinary suspension notice after investigation which in effect reflects only conclusions as to the use of stated derogatory words, like conclusional statements as to "slowdown" events, gives the appearance of a lack of documentation and specifics. At the least it impresses as a poorly drawn reflection of an investigator's work, where specifics as to the particular events and interview statements on which the charges are based is a reflection of support and thoroughness. While interview statements were made, they were not used with specificity in the notice. And as reflected within, they are in many instances found not to be necessarily or in fact supportive of the notice's conclusions. When the notice's statements as to why CalMat, notwithstanding their "slowdown" conclusion, was giving Germann another chance are viewed against the employees' statements on which this conclusion is represented to be based, Germann acts alleged to have occurred some months before and employee acts which did not take place, these employees' statements, a mystery in the notice, do not necessarily or in fact state Germann did what CalMat in this notice accuses him of doing.

Also of significance in dual motive weighting is the fact of the more than 22 day length of the suspension imposed, severe beyond the criteria of the firm's progressive discipline standard. The length of time Germann was continued on suspension, including because of Dyer's

responses to Stillwagen is of significance. Then that this important Human Relations notice, drawn up on ostensibly careful review of the firm's records by its Human Relations office, would err in its listing and consideration of prior disciplinary actions which significantly affect the action taken also does not reflect well on the integrity of the process.

To the extent it is represented there was physical aggression, or a threat in the "window knocking" encounter, the record including how Contreras described what happened and how he was reclining in his truck, on a more likely than not basis does not indicate that what occurred in Germann's approach was a physical threat or that physical aggression occurred. Contreras in 4/30/98 interviews did not relate anything about the jacket "rip jacket off" statement as perceived physical aggression, interviews in which he was reporting perceived throttle and water tank threats. Only when Dyer drew Contreras out at subsequent interview about an alleged three months prior Germann statement did it evolve into a stated physical aggression threat.

Nor was Contreras' testimony his family life and emotions were affected, he lost sleep because of the Germann events particularly convincing, including when the Vallese-Sengle testimony on his conduct was heard. Then when record review indicated these events occurred over but four days ending with Germann's apology; there was no reflection of any such affects in his statements to fellow employees or in the Dyer/ Bruzzi Contreras interview notes, but there is a note Contreras, in describing his experiences with Germann, referred to his wife by indicating Germann was a worse nag than his wife, the persuasiveness of these Contreras representations was not enhanced. There is a pretext aura to these representations. The fact he would so represent, in juxtaposition to the Vallese testimony as to how he conducts himself only served to add discount weight to Contreras' representations overall.

The ostracism contentions, and the argued Germann responsibility for such are not very convincing given the evidence, evidence which shows drivers' dissension and differences of opinion pre-existing the 4/24/98 events and thereafter, including references to "union man" and "company man" and interview indications Contreras referred to himself to fellow drivers as a "company man." There is no factual basis for belief, despite Dyer's opinion to the contrary and Cal/Mat's argument, that Germann in his pursuit of his protected activities complaints was not genuinely concerned with the safety rules' application at CalMat, or that he did not strongly believe the drivers who violated the law at Gunther's request, or in similar circumstances were wrong under the driver safety laws and the violators were responsible to their fellow drivers. So it is not too persuasive when CalMat argues that what followed among the drivers, that any adverse reactions Contreras experienced among his fellow drivers, and Germann's advice to Contreras he should apologize to his fellow drivers who did not violate the law that night, is somehow supportive of their Contreras harassment legitimate business reasons and reflects adversely on Germann's safety concerns credibility. These events and reactions were the result of Germann's pursuit of and his vocalizations to the drivers on the violations, and his suspension. As with employer's argument Germann revealed himself a liar in his certified return receipts actions and testimony, these arguments carry little weight when the entire circumstances and facts are considered.

It seems inconsistent that Dyer was “suspicious” of Contreras’ statement he had settled the Germann matter because Dyer thought Contreras might have felt pressured, yet it didn’t occur to Dyer that Vallese might have felt “pressured” to resolve the matter because the other men might have held any complaint against her. *See* TR: 856. In the face of the 5/11/98 resolution letter between the employees and with knowledge of Germann’s pre 5/1/98 apology to Contreras for hurting his feelings, CalMat elected to pursue both suspension actions here.

Dyer’s explanation of why he did not investigate Vallese’s claim is inconsistent with his handling of the Germann/Contreras matter. Dyer testified that Vallese “was satisfied with the way things were, and because the behavior had stopped and I didn’t see any reason for the company to do anything else.” TR: 708. In the Germann matter, however, Dyer stated he had a “moral” obligation to follow up, even though Contreras voluntarily signed the letter stating the two men had worked things out. Further, Dyer stated he did not investigate Vallese’s claim because, “there was not cause to in my mind... she did not come and bring this information to me in the form of a complaint.” TR: 709. Contreras did not file a complaint in the Germann matter, either. It wasn’t until Contreras during the protected activities investigation was talked to by White, in the manner described and evaluated within, that the incidents with Germann were mentioned and Contreras, canny to the situation as he was in the Vallese-Sigler events, was engaged by CalMat management.

Also, Dyer’s notes and recollection of the Vallese matter seem inadequate compared to those taken in connection with the Germann matter and as indicated within are not correct reflections of what he was told by Vallese. He stated he did not know how many times the offending behavior occurred, or over what period of time. He incorreced stated that “she never said that she objected to it or [was] offended by it,” yet he knew she asked another employee to ask Conteras to stop, and she found the behavior offensive enough to bring it to Dyer’s attention. It is also curious Dyer did not think Contreras’ behavior was “sexual harassment,” (TR: 714) especially considering he found in another unrelated incident that the comment “the bathroom needs cleaning. You need to go do that” had a “sexual element.” TR: 839. It is also inconsistent that Dyer had “a moral and ethical duty” to follow up on the Germann matter because an ethnic slur is a violation of company policy, yet it “did not occur to [him]” that Contreras’ alleged behavior toward Vallese could be a violation of CalMat’s sexual harassment policy. TR: 715-716. That Dyer would remember Contreras was tearful but would not remember that Vallese was crying when she talked to him about Contreras’ actions, made one wonder about Dyer’s investigative technique.

For all these reasons, the preponderance of the persuasive evidence indicates Complainant’s protected activities were the more likely reason for both adverse suspension actions. It is so found and concluded. It is also found and concluded on a weighing under the dual motive analysis criteria that CalMat has not persuaded by a preponderance of the credible evidence that absent Germann’s protected activities the adverse suspension actions taken, on 5/1/98 and 5/22/98, would have occurred. The presentation persuades by the more credible evidence that but for Germann’s protected activities the adverse actions of 5/1/98 and 5/22/98 would not have been taken by White, Coley, Dickerson and Dyer, by the deciding Cal Mat managers and officials.

This decision is based solely on these two 5/98 adverse personnel actions and on the evidence as to the events and facts in 4/98 and until 5/22/98, fully developed at this proceeding. All evidence of record has been considered on these events and facts.

Attorney Fees

Since the STAA provides a successfully Complainant receive all of his reasonable attorney fees and costs, the Complainant is entitled to such. However such expenses are not recoverable unless and until the Secretary's order is issued in Complainant's favor. Thus this issue and the resolution of any dispute over attorney fees and costs will be deferred until after the Secretary of Labor's order.

Based on the above specific findings of fact and recommended conclusions of law the following **RECOMMENDED ORDER** is issued:

RECOMMENDED ORDER

1. Cal Mat shall remove the 5/1/98 and 5/22/98 disciplinary suspensions imposed on Robert E. Germann and for the period of work time and pay he lost as a result of these suspension actions CalMat shall provide him with the identical wages and all the benefits he would have received for this period of suspension. This shall include his daily pay at prevailing collective bargaining scale, all vacation credits and all pension benefits credits as well as all medical benefits for the period he was suspended.
2. CalMat shall pay interest on the wages Robert E. Germann is entitled to and ordered paid under paragraph 1. above at the rate specified in 28 U.S.C. §1961 from the date such ordered wages would have been paid to the Complainant if not suspended to the date such payments are actually made by CalMat.
3. CalMat shall remove all references to the suspension events of 5/1/98 and 5/22/98 from Robert E. Germann's personnel file and shall correct Robert E. Germann's disciplinary history with them to reflect the removal of the 5/1/98 and 5/22/98 suspensions.

ELLIN M.O'SHEA

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